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CASES

ON

LEGAL LIABILITY

BY

JOSEPH HENRY BEALE

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CAMBRIDGE
HARVARD UNIVERSITY PRESS
1915

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TO

JEREMIAH SMITH

PREFACE.

THE subject of the present collection is that body of legal principles which determines whether one may be charged with the consequences of his act. Not all the requisites of ultimate liability are here considered; the element of blame is not treated. It is left for a more particular study of the law of Torts to determine what degree of intention, malice or negligence must exist before one may be forced to make compensation for a wrong; and for a study of Criminal Law to determine how far a guilty mind is requisite before punishment can be inflicted. The topics here considered are those fundamental ones which are a common element of torts and crimes; and the object of this collection is to prevent that duplication of effort which has heretofore existed through the attempt to include instruction in these topics in courses on Torts and on Criminal Law.

The editor can claim little credit for the selection of the cases here collected. Most of the civil cases on Causation have been found in Judge Smith's Cases on Torts, and in the notes to his illuminating articles on Legal Cause (Harvard Law Review, vol. XXV, pp. 103, 223, 303). Most of the civil cases on Permitted Acts have been found in the text and notes of Ames's Cases on Torts. Most of the criminal cases have been taken from the second edition of the present editor's Cases on Criminal Law.

J. H. BEALE.

CAMBRIDGE, December 1, 1914.

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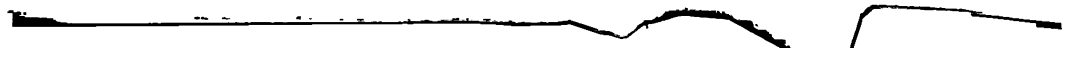

CASES ON LEGAL LIABILITY.

CHAPTER I.

LAW.

PRIOR OF LEWIS *v.* BISHOP OF ELY.

COMMON BENCH. 1304.

[*Reported Year Book* 32 *Edw. I.* 31.]

THIS was a suit brought against the defendant to test the right of appointment by the bishop to a living which was within the gift of the prior. The prior alleged that he had presented a suitable person for the living but the bishop refused him, and appointed another person.

Toutheby for the defendant alleged that the person presented was an unsuitable person for three reasons stated by him.[1]

Herle for the plaintiff. He presented a suitable person ready &c. where and when &c. But consider whether he shall be received to aver these three causes; for the judgment to be by you now given will be hereafter an authority in every *Quare non admisit* in England.

LANGBRIDGE'S CASE.

COMMON BENCH. 1345.

[*Reported Year Book* 19 *Edw. III.* 375.]

THIS was a suit to recover land. The party defendant (called the tenant) made default; whereupon Langbridge prayed that he might be admitted to defend, because the tenant had only a life estate, and the remainder was in himself.[1]

[1] The statement of the case has been simplified, and only such portions of the case are given as bear on the sources of law. — ED.

Huse (for the petitioner) produced a deed showing the gift.

R. Thorpe (for the demandant). You see plainly that his right is not proved by record or by fine, and we cannot have any answer to this deed nor is it an issue to say that he has nothing in remainder; and since we cannot have an answer to his statement, we pray seisin.

SHARSHULLE, J. One has heard speak of that which Bereford and Herle [former judges] did in such a case, that is to say, when a remainder was limited in fee simple by fine they admitted the person in remainder to defend, and it was said by them that it would be otherwise if the limitation were by deed *in pais;* but nevertheless, no precedent is of such force as that which is right.[1] . . .

HILLARY, J. Demandant, will you say anything else to oust him from being admitted?

R. Thorpe. If it so seems to you, we are ready to say what is sufficient; and I think you will do as others have done in the same case, or else we do not know what the law is.

HILLARY, J. It is the will of the Justices.

STONORE, C. J. No; law is that which is right.[2]

BLACKSTONES' COMMENTARIES, Book I, pp. 68–73.

Some have divided the common law into two principal grounds or foundations: 1. Established customs; such as that, where there are three brothers, the eldest brother shall be heir to the second, in exclusion of the youngest: and 2. Established rules and maxims; as, "that the king can do no wrong, that no man shall be bound to accuse himself," and the like. But I take these to be one and the same thing. For the authority of these maxims rests entirely upon general reception and usage: and the only method of proving that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it.

But here a very natural, and very material, question arises: how are these customs and maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositaries of the laws; the living oracles who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. The knowledge of that law is derived from experience and study; from the "*viginti annorum lucubrationes,*" which Fortescue mentions; and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence that can be given, of the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under

[1] Come resoun.

[2] Nanyl; ley est resoun.

the name of *records*, in public repositories set apart for that particular purpose; and to them frequent recourse is had when any critical question arises in the determination of which former precedents may give light or assistance. And therefore, even so early as the conquest, we find the "*præteritorum memoria eventorum*" reckoned up as one of the chief qualifications of those, who were held to be "*legibus patriæ optime instituti.*" For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined. And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded. And it hath been an ancient observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.

The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration. To illustrate this doctrine by examples. It has been determined, time out of mind, that a brother of the half blood shall never succeed as heir to the estate of his half brother, but it shall rather escheat to the king, or other superior lord. Now this is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions; and therefore can never be departed from by any modern judge without a

breach of his oath and the law. For herein there is nothing repugnant to natural justice; though the artificial reason of it, drawn from the feodal law, may not be quite obvious to everybody. And therefore, though a modern judge, on account of a supposed hardship upon the half brother, might wish it had otherwise been settled, yet it is not in his power to alter it. But if any court were now to determine, that an elder brother of the half blood might enter upon and seize any lands that were purchased by his younger brother, no subsequent judges would scruple to declare that such prior determination was unjust, was unreasonable, and therefore was *not law*. So that *the law*, and the *opinion of the judge*, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law. Upon the whole, however, we may take it as a general rule, "that the decisions of courts of justice are the evidence of what is common law:" in the same manner as, in the civil law, what the emperor had once determined was to serve for a guide for the future.

The decisions therefore of courts are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of *reports* which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides and the reasons the courts gave for this judgment; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain, the records, which always, in matters of consequence and nicety, the judges direct to be searched. The reports are extant in a regular series from the reign of King Edward the Second inclusive; and, from his time to that of Henry the Eighth, were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown, and published *annually*, whence they are known under the denomination of the *year books*. And it is much to be wished that this beneficial custom had, under proper regulations, been continued to this day: for, though King James the First, at the instance of Lord Bacon, appointed two reporters with a handsome stipend for this purpose, yet that wise institution was soon neglected, and from the reign of Henry the Eighth to the present time this task has been executed by many private and contemporary hands; who sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination. Some of the most valuable of the ancient reports are those published by Lord Chief-Justice Coke; a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works. However, his writings are so highly esteemed, that they are generally cited without the author's name.

Besides these reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law. Such are Glanvil and Bracton, Britton and Fleta, Hengham and Littleton, Statham, Brooke, Fitzherbert, and Staundforde, with some others of ancient date; whose treatises are cited as authority, and are evidence that cases have formerly happened in which such and such points were determined, which are now become settled and first principles. One of the last of these methodical writers in point of time, whose works are of any intrinsic authority in the courts of justice, and do not entirely depend on the strength of their quotations from older authors, is the same learned judge we have just mentioned, Sir Edward Coke; who hath written four volumes of institutes, as he is pleased to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive comment upon a little excellent treatise of tenures, compiled by Judge Littleton in the reign of Edward the Fourth. This comment is a rich mine of valuable common law learning, collected and heaped together from the ancient reports and year books, but greatly defective in method. The second volume is a comment upon many old acts of parliament, without any systematical order; the third a more methodical treatise of the pleas of the crown; and the fourth an account of the several species of courts.

PARKE, J., in Mirehouse *v.* Rennell, 1 Cl. & F. 527, 546.[1] The precise facts stated by your Lordships have never, as far as we can learn, been adjudicated upon in any Court; nor is there to be found any opinion upon them of any of our Judges, or of those ancient text writers to whom we look up as authorities. The case, therefore, is in some sense new, as many others are which continually occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves, according to our own judgment of what is just and expedient. Our common-law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.

[1] Cited in Wambaugh, Study of Cases, § 77 : and see §§ 73–79. — ED.

COMMONWEALTH *v.* CHAPMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1848.

[*Reported* 13 *Metcalf*, 68.]

SHAW, C. J. This was an indictment against the defendants for a false and malicious libel, tried before the Court of Common Pleas, and, upon a conviction there, the case is brought before this court, upon an exception which has been most elaborately argued by the learned counsel for the defendants, and which, if sustained, must go to the foundation of the prosecution; namely, that there is no law of this Commonwealth by which the writing and publishing of a malicious libel can be prosecuted by indictment, and punished as an offence. The proposition struck us with great surprise, as a most startling one; but as it was seriously presented and earnestly urged in argument, we felt bound to listen, and give it the most careful consideration; but after the fullest deliberation, we are constrained to say, that we can entertain no more doubt upon the point than we did when it was first offered.

It is true that there is no statute of the Commonwealth declaring the writing or publishing of a written libel, or a malicious libel, by signs and pictures, a punishable offence. But this goes little way towards settling the question. A great part of the municipal law of Massachusetts, both civil and criminal, is an unwritten and traditionary law. It has been common to denominate this "the common law of England," because it is no doubt true that a large portion of it has been derived from the laws of England, either the common law of England, or those English statutes passed before the emigration of our ancestors, and constituting a part of that law, by which, as English subjects, they were governed when they emigrated; or statutes made afterwards, of a general nature, in amendment or modification of the common law, which were adopted in the colony or province by general consent.

In addition to these sources of unwritten law, some usages, growing out of the peculiar situation and exigencies of the earlier settlers of Massachusetts, not traceable to any written statute or ordinance, but adopted by general consent, have long had the force of law; as, for instance, the convenient practice, by which, if a married woman join with her husband in a deed conveying land of which she is seized in her own right, and simply acknowledge it before a magistrate, it shall be valid to pass her land, without the more expensive process of a fine, required by the common law. Indeed, considering all these sources of unwritten and traditionary law, it is now more accurate, instead of the common law of England, which constitutes a part of it, to call it collectively the common law of Massachusetts.

To a very great extent, the unwritten law constitutes the basis of our jurisprudence, and furnishes the rules by which public and private rights

are established and secured, the social relations of all persons regulated, their rights, duties, and obligations determined, and all violations of duty redressed and punished. Without its aid, the written law, embracing the constitution and statute laws, would constitute but a lame, partial, and impracticable system. Even in many cases, where statutes have been made in respect to particular subjects, they could not be carried into effect, and must remain a dead letter, without the aid of the common law. In cases of murder and manslaughter, the statute declares the punishment; but what acts shall constitute murder, what manslaughter, or what justifiable or excusable homicide, are left to be decided by the rules and principles of the common law. So, if an act is made criminal, but no mode of prosecution is directed, or no punishment provided, the common law furnishes its ready aid, prescribing the mode of prosecution by indictment, the common law punishment of fine and imprisonment. Indeed, it seems to be too obvious to require argument, that without the common law, our legislation and jurisprudence would be impotent, and wholly deficient in completeness and symmetry, as a system of municipal law.

It will not be necessary here to consider at large the sources of the unwritten law, its authority as a binding rule, derived from long and general acquiescence, its provisions, limits, qualifications, and exceptions, as established by well authenticated usage and tradition. It is sufficient to refer to 1 Bl. Com. 63 *et seq.*

If it be asked, "How are these customs or maxims, constituting the common law to be known, and by whom is their validity to be determined?" Blackstone furnishes the answer; "by the judges in the several courts of justice. They are the depositaries of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study," "and from being long personally accustomed to the judicial decisions of their predecessors." 1 Bl. Com. 69.

Of course, in coming to any such decision, judges are bound to resort to the best sources of instruction, such as the records of courts of justice, well authenticated histories of trials, and books of reports, digests, and brief statements of such decisions, prepared by suitable persons, and the treatises of sages of the profession, whose works have an established reputation for correctness.

That there is such a thing as a common or unwritten law of Massachusetts, and that, when it can be authentically established and sustained, it is of equal authority and binding force with the statute law, seems not seriously contested in the argument before us. But it is urged that, in the range and scope of this unwritten law, there is no provision which renders the writing or publishing of a malicious libel punishable as a criminal offence.

The stress of the argument of the learned counsel is derived from a supposed qualification of the general proposition in the constitution of

Massachusetts, usually relied on in proof of the continuance in force of the rules and principles of the common law, as they existed before the adoption of the constitution. The clause is this: Chap. 6, Art. 1, Sect. 6: "All the laws which have been adopted, used, and approved in the province, colony, or state of Massachusetts Bay and usually practised on in the courts of law, shall still remain and be in full force until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution."

It is then argued, that it is in virtue of this clause of the constitution that the common law of England, and all other laws existing before the revolution, remain in force, and that this clause so far modifies the general proposition, that no laws are saved, but those which have been actually applied to cases in judgment in a court of legal proceeding; and unless it can be shown affirmatively that some judgment has been rendered, at some time before the adoption of the constitution, affirmative of any particular rule or principle of the common law, such rule is not brought within the saving power of this clause, and cannot therefore be shown to exist. We doubt the soundness of this proposition, and the correctness of the conclusion drawn from it.

We do not accede to the proposition, that the present existence and effect of the whole body of law, which existed before the constitution, depends solely upon this provision of it. We take it to be a well-settled principle, acknowledged by all civilized states governed by law, that by means of a political revolution, by which the political organization is changed, the municipal laws, regulating their social relations, duties, and rights, are not necessarily abrogated. They remain in force, except so far as they are repealed or modified by the new sovereign authority. Indeed, the existence of this body of laws, and the social and personal rights dependent upon them, from 1776, when the Declaration of Independence was made, and our political revolution took place, to 1780, when this constitution was adopted, depend on this principle. The clause in the constitution, therefore, though highly proper and expedient to remove doubts, and give greater assurance to the cautious and timid, was not necessary to preserve all prior laws in force, and was rather declaratory of an existing rule, than the enactment of a new one. We think, therefore, it should have such a construction as best to carry into effect the great principle it was intended to establish.

But further; we think the argument is unsound in assuming that no rule of the common law can be established under this clause of the constitution, without showing affirmatively, that in some judicial proceeding, such rule of law has been drawn in question and affirmed, previously to the adoption of the constitution. During that time there were no published report of judicial proceedings. The records of courts were very imperfectly kept, and afford but little information in

regard to the rules of law discussed and adopted in them. And who has examined all the records of all the criminal courts of Massachusetts, and can declare that no records of such prosecutions can be found? But so far as it regards libel, as a criminal offence, we think it does appear, from the very full and careful examination of the late Judge Thacher (*Commonwealth* v. *Whitmarsh*, Thacher's Crim. Cases, 441), that many prosecutions for libel were instituted in the criminal courts before the Revolution, and none were ever quashed or otherwise disposed of, on the ground that there was no law rendering libels punishable. In the case of the indictments returned against Governor Gage and others, very much against the will of the judges, those indictments were received and filed, and remained, until *non prossed* by the king's attorney-general. This investigation of the history of the common law of Massachusetts is so thorough, complete, and satisfactory, that it is sufficient to refer to it, as a clear elucidation of the subject.

But we think there is another species of evidence to prove the existence of the common law, making libel an offence punishable by law, clear, satisfactory, and decisive; and that is, these rules of law, with some modification, caused by the provisions of the constitution, have been affirmed, declared, and ratified by the judiciary and the legislative departments of the existing government of Massachusetts, by those whose appropriate province and constitutional duty it was to act and decide upon them; so that they now stand upon a basis of authority which cannot be shaken, and must so stand until altered or modified by the legislature.

When our ancestors first settled this country, they came here as English subjects; they settled on the land as English territory, constituting part of the realm of England, and of course governed by its laws; they accepted charters from the English government, conferring both political powers and civil privileges; and they never ceased to acknowledge themselves English subjects, and never ceased to claim the rights and privileges of English subjects, till the Revolution. It is not therefore, perhaps, so accurate to say that they established the laws of England here, as to say, that they were subject to the laws of England. When they left one portion of its territory, they were alike subject, on their transit and when they arrived at another portion of the English territory; and therefore always, till the Declaration of Independence, they were governed and protected by the laws of England, so far as those laws were applicable to their state and condition. Under this category must come all municipal laws regulating and securing the rights of real and personal property, of person and personal liberty, of habitation, of reputation and character, and of peace. The laws designed for the protection of reputation and character, and to prevent private quarrels, affrays, and breaches of peace, by punishing malicious libel, were as important and as applicable to the state and condition of the colonists as the law punishing violations of the

rights of property, of person, or of habitation; that is, as laws for punishing larceny, assault and battery, or burglary. Being part of the common law of England, applicable to the state and condition of the colonists, they necessarily applied to all English subjects and territories, as well in America as in Great Britain, and so continued applicable till the Declaration of Independence.

This, therefore, would be evidence, *a priori*, that they were in force, and were adopted by the clause cited from the constitution, except so far as modified by the excepting clause.

That the law of libel existed, at the first migration of our ancestors, and during the whole period of the colonial and provincial governments, is proved by a series of unquestionable authorities.[1]

Exceptions overruled.[2]

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[1] The learned Chief Justice proceeded to show that these authorities had been followed in Massachusetts since the adoption of the constitution. — ED.

[2] See to the same effect State *v.* Cawood, 2 Stew. (Ala.) 360; State *v.* Danforth, 3 Conn. 112; State *v.* Davis, 2 Penne. (Del.) 139; State *v.* Buchanan, 5 H. & J. (Md.) 317; Smith *v.* People, 25 Ill. 17; State *v.* Pulle, 12 Minn. 164; Terr. *v.* Ye Wan, 2 Mont. 478; State *v.* Rollins, 8 N. H. 550; Com. *v.* McHale, 97 Pa. 397; State *v.* Williams, 2 Overt. (Tenn.) 108; State *v.* La Forrest, 71 Vt. 311; Houston *v.* Com., 87 Va. 257; Nicholls *v.* State, 68 Wis. 416.

In State *v.* Danforth, *supra*, HOSMER, C. J., said: "It is indispensably necessary that there should exist a common law, on the broad principles of public convenience and necessity, defining crimes and prescribing adequate punishments. To determine, by statute, every offence and direct the punishment which shall be inflicted, has not, so far as I know, ever been attempted, and would be nearly impracticable. The community must, at least, be left exposed to injuries the most atrocious; and the evils resulting would be much greater, than any mind will anticipate, from the exercise of a sound discretion, in the application of principles and analogies which the common law supplies." — ED.

BLANKARD *v.* GALDY.

KING'S BENCH. 1698.

[*Reported* 2 *Salkeld*, 411.]

IN debt on a bond, the defendant prayed oyer of the condition, and pleaded the statute E. 6. against buying offices concerning the administration of justice; and averred, That this bond was given for the purchase of the office of provost-marshal in Jamaica, and that it concerned the administration of justice, and that Jamaica is part of the revenue and possessions of the Crown of England: The plaintiff replied, that Jamaica is an island beyond the seas, which was conquered from the Indians and Spaniards in Queen Elizabeth's time, and the inhabitants are governed by their own laws, and not by the laws of England: The defendant rejoined, That before such conquest they were governed by their own laws; but since that, by the laws of England: Shower argued for the plaintiff, that, on a judgment in Jamaica, no writ of error lies here, but only an appeal to the Council; and as they are not represented in our Parliament, so they are not bound by our statutes, unless specially named. *Vide* And. 115. Pemberton *contra* argued, that by the conquest of a nation, its liberties, rights, and properties are quite lost; that by consequence their laws are lost too, for the law is but the rule and guard of the other; those that conquer, cannot by their victory lose their laws, and become subject to others. *Vide* Vaugh. 405. That error lies here upon a judgment in Jamaica, which could not be if they were not under the same law. *Et per* HOLT, C. J. & Cur.,

First, in case of an uninhabited country newly found out by English subjects, all laws in force in England are in force there; so it seemed to be agreed.

Secondly, Jamaica being conquered, and not pleaded to be parcel of the kingdom of England, but part of the possessions and revenue of the Crown of England, the laws of England did not take place there, until declared so by the conqueror or his successors. The Isle of Man and Ireland are part of the possessions of the Crown of England; yet retain their ancient laws: That in Davis 36. it is not pretended, that the custom of tanistry was determined by the conquest of Ireland, but by the new settlement made there after the conquest: That it was impossible the laws of this nation, by mere conquest, without more, should take place in a conquered country; because, for a time, there must want officers, without which our laws can have no force: That if our law did take place, yet they in Jamaica having power to make new laws, our general laws may be altered by theirs in particulars; also they held, that in the case of an infidel country, their laws by conquest do not entirely cease, but only such as are against the law of God; and

that in such cases where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity.

Judgment pro quer.[1]

FIRST NATIONAL BANK *v.* KINNER.

SUPREME COURT OF UTAH TERRITORY, 1873.

[*Reported* 1 *Utah* 100.]

EMERSON, J. In American Ins. Co. *v.* Canter, 1 Pet. 511, the court, by Judge Marshall, say, substantially, that the laws of Florida, as they were when the Territory was ceded, so far as not inconsistent with he Constitution and Laws of the United States, continued in force until altered by the newly created power of the State. (See, also, United States *v.* Powers, 11 How. 570; Strothers *v.* Lucas, 12 Pet. 410, 436.) This appears to be the settled doctrine in regard to conquered and ceded Territory in the absence of special treaty stipulation. It applies to territory acquired from Mexico, since the treaty of Guadaloupe made no special provision on the subject. Utah was embraced in that acquisition. As in Florida the pre-existing law was Spanish, so in Utah, it was Mexican, and in both cases the laws were derived mainly from the laws of Rome. In neither did the English common law, or the Statute of Frauds, prevail. Congress made no special change, and the Territorial Legislature, upon whom authority was conferred, have made no express enactment upon the subject.

This Territory was first settled in 1847, and from that time up to the acquisition and treaty in 1848, the settlers were comparatively few in number. There were no settled laws, usages, and customs among them. They came here as American citizens, under the flag, and claiming the protection of the United States Government.

The particular class of persons forming the great, if not the entire bulk of emigrants, claim to have furnished troops from among their own numbers to assist this Government in its war against Mexico.

At the time of the acquistion and treaty, they could not claim Mexican citizenship, and have never adopted its laws and customs.

Soon after the change of sovereignty by the treaty, emigrants in

[1] Another report of the same case may be found in 4 Mod. 222. In that case the Court is reported to have said: "And therefore it was held, that Jamaica was not governed by the laws of England after the conquest thereof, till new laws were made: for they had neither sheriff or counties; they were only an assembly of people which are not bound by our laws, unless particularly mentioned. In Barbadoes all freeholds are subject to debts, and are esteemed as chattels till the creditors are satisfied, and then the lands descend to an heir; but the law is otherwise here; which shows that though that island is parcel of the possessions of England, yet it is not governed by the laws made here, but by their own particular laws and customs."

Acc. Earl Derby's Case, 2 And. 116; Mem- 2 P. Wms. 75. See Cross *v.* Harrison, 16 How. 164; Airhart *v.* Massieu, 98 U. S. 491.— ED.

large numbers flocked in from the States and surrounding Territories, and for many years there has been an organized community.

When we turn to the communities from whence these emigrants proceeded, we find that they differed one from another, more or less, in regard to their laws and institutions. No two are alike. In the most, it is true, many common-law principles and doctrines were in force. Still the body of the common law in each was peculiar to the particular State, and it was rather the common law of the State than the English common law. In some, the English statutes had been received as common law; in others, not.

These diversities make it impossible to assume that any specific body of the common law was transplanted to the Territory by the fact of immigration.

But one course was open, and that was for the whole body of the people to agree, expressly or tacitly, upon a common measure. It was to be expected that the emigrants would not be contented with the loose and alien institutions of an outlying Mexican department, and they have not been.

They have tacitly agreed upon maxims and principles of the common law suited to their conditions and consistent with the Constitution and Laws of the United States, and they only wait recognition by the courts to become the common law of the Territory. When so recognized, they are laws as certainly as if expressly adopted by the law-making power.

CHAPPELL *v.* JARDINE.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1884.

[*Reported* 51 *Connecticut*, 84.]

PARK, C. J.[1] This is a suit for the foreclosure of certain mortgaged premises, constituting an island, known as Ram Island, in Long Island Sound. The complaint alleges that the land mortgaged, at the time the deed was given, lay in the town of Southhold, Suffolk County, in the State of New York, and it is averred that the mortgage was recorded in the office of the clerk of Suffolk County in that State. It is further alleged that Ram Island, by the recent establishment of the boundary line between the State of New York and this State, has become a part of the town of Stonington in this State. The complaint is demurred to, so that the averment stands admitted that the island was, when the mortgage was made, a part of the State of New York.

We have heretofore held (Elphick *v.* Hoffman, 49 Conn. 331) that the boundary agreed upon by the joint commission of the two States and established by the legislative acceptance of both States, was to be regarded as presumably a designation and establishment of the pre-

[1] Part of the opinion is omitted. — ED.

existing boundary line which had become lost, and not as the establishment of a new line, leaving the matter open to proof in special cases. If we should apply that rule here, and consider the island in question as having been legally a part of this State when the mortgage was made, we should at once encounter another question of a serious nature. There can be no question that whatever has been the *de jure* jurisdiction over the island, it has been for many years within the *de facto* jurisdiction of the State of New York; and we should be compelled to determine the legal effect upon this mortgage of that *de facto* jurisdiction.

We have thought it as well, therefore, to take the case as the parties have themselves presented it, the plaintiff by the averments of his complaint and the defendants by the admissions of their demurrer, and regard the island in question as having been within the State of New York when the mortgage was made, and afterwards brought within this State by the establishment of the boundary line. Indeed as the proceeding is in error we cannot properly govern ourselves by anything but the record as it comes before us.

And in treating the island as within the State of New York when the mortgage was made we are regarding the contract and the rights of the parties under it, precisely as they themselves understood them at the time.

The mortgaged premises having been in the State of New York when the mortgage was made, it is of course to be governed in its construction and effect by the laws of that State then in force. In McCormick *v.* Sullivant, 10 Wheat. 192, the court say: "It is an acknowledged principle of law that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another." The same doctrine is held in United States *v.* Crosby, 7 Cranch, 115, Kerr *v.* Moon, 9 Wheat. 565, Darby *v.* Mayer, 10 id. 465, and in many other cases. Indeed the doctrine is unquestioned law everywhere.

Now, according to the laws of the State of New York then and still in force, a mortgage of real estate creates a mere chose in action, a pledge, a security for the debt. It conveys no title to the property. The claim of the mortgagee is a mere chattel interest. He has no right to the possession of the property. The title and seisin remain in the mortgagor, and he can maintain trespass and ejectment against the mortgagee, if he takes possession of the property without the consent of the mortgagor. This appears clearly from the following cases.[1]

It follows, therefore, that while the land in question remained in the State of New York, it was incumbered by a mortgage of this character;

[1] The learned judge here cited and discussed the following cases: Gardner *v.* Heartt, 3 Den. 232; Power *v.* Lester, 23 N. Y. 527; Trimm *v.* Marsh, 54 N. Y. 599; Jackson *v.* Willard, 4 Johns. 42; Astor *v.* Hoyt, 5 Wend. 603; Kortright *v.* Cady, 21 N. Y. 343; Merritt *v.* Bartholick, 36 N. Y. 44. — Ed.

and when it came into this State it bore with it the same burden precisely. There was nothing in the change of jurisdiction that could affect the contract of mortgage that had been made between the parties. The title to the property continued to remain in the mortgagor, and it remains in him still. This is clear. The laws of this State could not make a new contract for the parties or add to one already made. They had to take the contract as they found it.

Now it is clear that there is no remedy by way of foreclosure known to our law which is adapted or appropriate to giving relief on a mortgage of this character. Our remedy is adapted to a mortgage deed which conveys the title of the property to the mortgagee, and when the law day has passed, the forfeiture, stated in the deed, becomes absolute at law, and vests a full and complete title in the mortgagee, with the exception of the equitable right of redemption, which still remains in the mortgagor. The object of the decree of foreclosure is, to extinguish this right of redemption if the mortgage debt is not paid by a specified time. The decree acts upon this right only. It conveys nothing to and decrees nothing in the mortgage if the debt is not paid. After the law day has passed the right of redemption becomes a mere cloud on the title the mortgagee then has, and when it is removed his title becomes clear and perfect. Phelps *v.* Sage, 2 Day, 151; Roath *v.* Smith, 5 Conn. 136; Chamberlin *v.* Thompson, 10 id. 244; Porter *v.* Seeley, 13 id. 564; Smith *v.* Vincent, 12 id. 1; Doton *v.* Russell, 17 id. 151; Cross *v.* Robinson, 21 id. 379; Dudley *v.* Caldwell, 19 id. 218; Colwell *v.* Warner, 36 id. 224.

What effect would such a decree produce upon a mortgage like the one under consideration, where the legal title remains in the mortgagor, and nothing but a pledgee's interest is in the mortgagee, even after the debt becomes due? It could only extinguish the right of redemption, if it could do that. It could not give the mortgagee the right of possession of the property, for the mortgagor has still the legal title, which carries with it the right of possession. It would require another proceeding in equity, to say the least, to dispossess him of that title, and vest it in the mortgagee. Hence it is clear that full redress cannot be given the plaintiff in this proceeding.

But the plaintiff has a lien on the property in the nature of a pledge to secure payment of the mortgage debt. And although our remedy of strict foreclosure may not be adapted to give redress to the plaintiff through the medium of such a lien, still a court of equity can devise a mode that will be appropriate; for it would be strange if a lawful lien upon property to secure a debt could not be enforced according to its tenor by a court of chancery. It is said that every wrong has its remedy; so it may be said that every case requiring equitable relief has its corresponding mode of redress. We have no doubt that a court of equity has the power to subject the property in question to the payment of this debt, upon a proper complaint adapted to the purpose. When personal property is pledged to secure the payment of a debt, it

may be taken and sold, that payment may be made, after giving the pledgor a reasonable opportunity for redemption. So here, we think a similar course might be taken with this property. Such a course would fall in with the original intent of the parties, and with the civil code and mode of procedure of the State of New York. Modes of redress in that State have of course no force in this State, but such a mode of procedure seems to be adapted to a case of this character.

And we further think that on an amended complaint, setting forth all the essential facts, and praying that if there shall be a default in redeeming the property during such time as the court shall allow for redemption, then the right of redemption shall be forever foreclosed, and the legal title and possession of the property be decreed in the mortgagee, such course might be taken.

We think either of the modes suggested might be pursued; but inasmuch as the course which has been taken leaves the legal title and possession of the property in the mortgagor, we think the court erred in holding the complaint sufficient, and in passing the decree thereon.

There is error in the judgment appealed from, and it is reversed, and the case remanded.

In this opinion the other judges concurred.

MORTIMER *v.* NEW YORK ELEVATED RAILROAD CO.

SUPERIOR COURT OF THE CITY OF NEW YORK. 1889.

[*Reported* 6 *New York Supplement*, 898.]

FREEDMAN, J. The claim made in this case by and on behalf of the elevated railway companies is that the absolute fee of the street known as the "Bowery" was, prior to the surrender of the Dutch forces to the English in 1664, in the Dutch government; that such fee thereafter went to the State or to the city of New York so absolutely that abutting owners never had, and do not now have, any easement of any kind in said street, and that, the elevated railway running through the Bowery having been constructed with the consent of both the city and the State, neither its owners nor its lessees are liable for any injury inflicted upon abutting property by reason of the construction and operation of the railway.

The claim of the English that they were the owners, by right of discovery, under governmental authority, of the land of which the present city of New York forms a part, and that this gave them such exclusive ownership that the Dutch government acquired no title to the land which can be recognized, has been fully set forth in the opinion of Judge TRUAX. I concur in his remarks as far as they go, but wish to add the following, viz.; —

The claim of the English, it is true, has occasionally been criticised on the ground that neither of the Cabots landed in or near New York, or saw the coast of New York. The right of discovery is not recognized in the Roman law unless followed by occupation, or unless the intention of the sovereign or State to take possession be declared or made known to the world. And it must be conceded that modern diplomatists and publicists incline to the opinion that mere transient discovery amounts to nothing unless followed in a reasonable time by occupation and settlement, more or less permanent, under the sanction of the State. But the question in the case at bar is not to be decided according to the rules of the international law of the present time. It is a question purely between the public authorities of the State of New York and citizens of the same State, and as such it is controlled by the decisions referred to by Judge TRUAX, to the effect that what the English did do was sufficient to give them title by discovery, and that such title is superior to the Indian title. These decisions proceeded upon the theory that the claim of the Dutch was contested by the English from the very start, not because they questioned the title given by discovery, but because they insisted on being themselves the rightful claimants under that title; and that the claim of the English was finally decided in their favor by the sword. That being so, it follows that, in contemplation of present law, neither the Dutch nor the Roman law ever prevailed in the State of New York *de jure*, and that the common law of England must be deemed to be the original source of all our law. And it further follows that the foundations of the rights of owners of land abutting on a street laid out while the Dutch were in possession, as against the city or the State of New York, rest upon the English common law, and that they are not to be affected by the Dutch or Roman law.

Reported cases in which the validity of Dutch grants was upheld between individuals have no application to the present controversy. Now, under the English common law, the presumption is that the owners of lands lying on a highway are the owners of the fee of the highway; that the owners on each side of the highway own the soil of the highway in fee to the centre of the highway; and that the rights of the public in and to the highway are no higher or other than those of a mere easement. Wager *v.* Railroad Co., 25 N. Y. 529. This presumption applies as well to the streets of a city as to a country highway. Bissell *v.* Railroad Co., 23 N. Y. 61. This presumption of law is founded on the supposition that the way was originally granted by the adjoining owners in equal proportions. Watrous *v.* Southworth, 5 Conn. 305. But the presumption may be rebutted by proof to the contrary, and it is rebutted by the production of a deed under which the owner derives title granting the land to the side of the street only. Under the operation of this rule, and there being no proof of alienation or escheat requiring a different conclusion, it must be assumed in this case that the original grantors from whom plaintiffs'

title has been derived owned the soil of the Bowery in front of the premises in suit to the centre of the street. But even if the title of the English rested not in discovery, but in conquest, and the English, upon the surrender by the Dutch in 1664, acquired from the Dutch a title to the then existing streets as absolute as under the Roman law the title of the government to a military highway was, the fact would not improve the position of the defendants. Upon receiving such title the English could do with it what they pleased. They were not bound to enforce it against abutting owners, as the Dutch government might have enforced it. The presumption is that they took the title and the streets to be held by them according to their own laws, and as matter of fact they thereafter so dealt with said streets as to admit of no other conclusion. The province having been granted by Charles II. to his brother, the Duke of York, by the charter of 1664, several months before the surrender to Sir Richard Nicolls, the grant, in order to remove all doubt as to its validity, was afterwards confirmed by the charter of 1674, also granted to the Duke of York. The object of both charters was to enable the Duke of York to plant a colony on this continent. The charter of 1664, issued under the great seal of England, contained a provision that the statutes, ordinances, etc., to be established by the Duke in the new country, "should not be contrary to, but as nearly as might be agreeable to, the laws, statutes, and government of the realm of England." This charter was, therefore, in itself, an explicit declaration of the King's will that the laws of England should be established in the colony, and that the laws of the Dutch settlers should not be retained. The consequence was that, having obtained the lands, the English held them, not under the Dutch or the civil law, but under the common law of their own country. English law governed English land, so that, even if an absolute title to a street was obtained, the street was ever thereafter treated as an English street, under the common law.[1]

[1] The learned judge then expressed the opinion that by subsequent acts of the Proprietor and of the State the city lost its rights, if any, to the legal fee.

In his concurring opinion TRUAX, J., said: "I am of the opinion that the fee of the Bowery, and of the other streets in the city of New York that are known as Dutch streets, never was in the Dutch government; and that it was, prior to the Revolution, bound by the rules of the common law, and not by the rules of the Dutch civil law. While the Dutch were in actual possession this execution of the common law was suspended, just as, during the late Rebellion, this execution of the laws of the United States could not be enforced in some of the southern States. But, said the Supreme Court of the United States in Ketchum *v.* Buckley, 99 U. S. 188, "the same general form of government, the same general law for the administration of justice and the protection of private rights which had existed in the States prior to the Rebellion, remained during its continuance and afterwards."

See *Ketchum* v. *Buckley*, 99 U. S. 188, and cases cited. — ED.

McKENNON *v.* WINN.

SUPREME COURT OF OKLAHOMA TERRITORY. 1893.

[*Reported* 1 *Oklahoma Reports*, 327.]

BURFORD, J.[1] The appellant filed his complaint in the court below to enforce the specific performance of a contract for the conveyance of real estate situated in Oklahoma City, Oklahoma County, Oklahoma Territory. A demurrer was filed to the complaint, alleging as grounds: *First.* That the court has no jurisdiction of the person of defendant, or the subject of the action. *Second.* That the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained, to which the appellant excepted and brings the case to this court by appeal. . . .

The second ground for demurrer presents two questions: *First.* Can a parol contract for the conveyance of real estate, or an interest therein, made after the settlement of this country, and prior to the adoption of our organic act, be enforced? *Second.* Is a contract for the conveyance of real estate, entered into before title is acquired from the United States, and to be executed after title is acquired, void, as against public policy?

The first proposition seems to be settled by the adjudicated cases and text writers in favor of the appellant. "Every contract, on whatever subject, may be in oral words, which will have the same effect as if written, except when some positive rule of the common or statutory law has provided otherwise." Bish. Cont. § 153; Mallory *v.* Gillett, 21 N. Y. 412; Wyman *v.* Goodrich, 26 Wis. 21; Green *v.* Brookins, 23 Mich. 48; White *v.* Maynard, 111 Mass. 250. By the common law, prior to the enactment of the statute of frauds (29 Car. II. c. 3, A. D. 1676), contracts for the sale of real estate, or an interest therein, were not required to be in writing. Bish. Cont. § 1231; 4 Kent Com. p. 450. The English-speaking people brought the common law to America with them, in the first settlement of the colonies; and it has prevailed in all the States and Territories, modified by legislative acts, local conditions, and such of the English statutes adopted prior to the settlement of our colonies as were of general application, and suited to our conditions, except in some portions where the French or civil law prevailed. At the time of the settlement and discovery of America the statute of frauds had not been adopted, and has only become the law of the United States, or of our several States and Territories, by legislative enactment.

This leads us to the inquiry, Did the common law prevail in the Territory in April, 1889? It is contended that prior to the settlement of Oklahoma, and until the same was superseded by statutory laws,

[1] Part of the opinion is omitted. — ED.

the Code Napoleon, or civil law, prevailed. Whatever may have been the laws of the country now known as Oklahoma, they ceased to operate in the region originally comprising the Indian Territory when the Territory ceased to be a part of the Territory of Louisiana, and the laws of the Territory of Indiana and the Territory of Missouri, which may have once prevailed in said region, became inoperative in and ceased to have any force or effect in the Indian Territory, when that Territory ceased to be a part of said Territories. Railroad Co. *v.* O'Loughlin, 49 Fed. Rep. 440. There was no law in the Indian Territory regulating the making of contracts at the time of the approval of the Act of Congress establishing a United States district court in said Territory by the act of March 1, 1889. 25 Stat. 783. Congress, with the assent of the Indians, created the court for the whole of the Indian Territory, which included Oklahoma, and conferred on it jurisdiction in all civil cases between citizens of the United States who are residents of the Territory, or between citizens of the United States or of any State or Territory, and any citizen of, or person residing or found in, the Indian Territory. It gave the court authority, and imposed upon it the duty, to apply the established rules and principles of the common law to the adjudication of those cases of which it was given jurisdiction. Pyeatt *v.* Powell, 51 Fed. Rep. 551. But if it be held that the establishment of a United States court in the Indian Territory did not put the common law in force in said Territory, except in so far as was necessary to execute the powers of said court, and for the adjudication of such cases as actually went into that forum, then there was no law in Oklahoma, at the date of its settlement, regulating the making of contracts. If this should be conceded, then it necessarily follows, on principle, that when people from all parts of the United States, on the 22d day of April, 1889, settled the country known as Oklahoma, built cities, towns, and villages, and began to carry on trade and commerce in all its various branches, they brought into Oklahoma, with them, the established principles and rules of the common law, as recognized and promulgated by the American courts, and as it existed when imported into this country by our early settlers, and unmodified by American or English statutes. So that, in any event, the common law prevailed in Oklahoma at the time the contract between the appellant and appellee was entered into; and as, at common law, contracts for the sale and conveyance of real estate were not required to be in writing, the contract mentioned in the complaint may be enforced, unless void for other reasons.[1]

[1] The contract was held not to be void on the ground alleged: the court followed on this point Lamb *v.* Davenport, 18 Wall. 307. — Ed.

LAWTON v. STEELE.

COURT OF APPEALS, NEW YORK, 1890.

[*Reported* 119 *N. Y.* 226.]

THIS action was brought to recover the value of sixteen hoop or fyke nets belonging to plaintiffs, which were destroyed by defendant.

ANDREWS, J. The point of difference between the trial court and the General Term relates to the constitutionality of the second section of the Act of 1880, as amended in 1883.[1] That section is as follows: "Sec. 2. Any net found, or other means or device for taking or capturing fish, or whereby they may be taken or captured, set, put, floated, had, found or maintained in or upon any of the waters of this state, or upon the shores or islands in any waters of this state, in violation of any existing or hereafter enacted statutes or laws for the protection of fish, is hereby declared to be, and is a public nuisance, and may be abated and summarily destroyed by any person, and it shall be the duty of each and every (game and fish) protector aforesaid and of every game constable, to seize and remove and destroy the same, . . . and no action for damages shall be maintained against any person for or on account of any such seizure or destruction." The defendant justified the seizure and destruction of the nets of plaintiff, as a game protector, under this statute, and established the justification, if the legislature had the constitutional power to authorize the summary remedy provided by the section in question. The trial judge held the act in this respect to be unconstitutional, and ordered judgment in favor of the plaintiffs for the value of the nets. The General Term sustained the constitutionality of the statute and reversed the judgment. We concur with the General Term for reasons which will now be stated.

The legislative power of the state which by the Constitution is vested in the senate and assembly (§ 1, art. 3), covers every subject which in the distribution of the powers of government between the legislative, executive and judicial departments, belongs by practice or usage, in England or in this country, to the legislative department, except in so far as such power has been withheld or limited by the Constitution itself, and subject also to such restrictions upon its exercise as may be found in the Constitution of the United States. From this grant of legislative power springs the right of the legislature to enact a criminal code, to define what acts shall constitute a criminal offense, what penalty shall be inflicted upon offenders, and generally to enact all laws which the legislature shall deem expedient for the protection of public and private rights, and the prevention and punishment of public wrongs. The legislature may not declare that to

[1] Only so much of the case as relates to the power to enact a statute is printed. — ED.

be a crime which in its nature is and must be under all circumstances innocent, nor can it in defining crimes, or in declaring their punishment, take away or impair any inalienable right secured by the Constitution. But it may, acting within these limits, make acts criminal which before were innocent, and ordain punishment in future cases where before none could have been inflicted. This, in its nature, is a legislative power, which, by the Constitution of the state, is committed to the discretion of the legislative body. (Barker *v.* People, 3 Cow. 686; People *v.* West, 106 N. Y. 293.) The act in question declares that nets set in certain waters are public nuisances, and authorizes their summary destruction. The statute declares and defines a new species of public nuisance, not known to the common law, nor declared to be such by any prior statute. But we know of no limitation of legislative power which precludes the legislature from enlarging the category of public nuisances, or from declaring places or property used to the detriment of public interests or to the injury of the health, morals or welfare of the community, public nuisances, although not such at common law. There are, of course, limitations upon the exercise of this power. The legislature cannot use it as a cover for withdrawing property from the protection of the law, or arbitrarily, where no public right or interest is involved, declare property a nuisance for the purpose of devoting it to destruction. If the court can judicially see that the statute is a mere evasion, or was framed for the purpose of individual oppression, it will set it aside as unconstitutional, but not otherwise. (*In re Jacobs*, 98 N. Y. 98; *Mugler* v. *Kansas*, 123 U. S. 661.)

LEE *v.* BUDE AND TORRINGTON JUNCTION RAILWAY.

COURT OF COMMON PLEAS, 1871.

[*Reported L. R.* 6 *C. P.* 576.]

WILLES, J.[1] This is an application for a writ of sci. fa. to try the question whether two persons as shareholders in the Bude and Torrington Junction Railway Company are bound to pay to the plaintiffs so much as may remain unpaid upon their respective shares, in discharge of a debt in respect of which the plaintiffs have obtained a judgment against the company pursuant to 8 & 9 Vict. c. 16, s. 36. . . .

It is further urged that the company was a mere nonentity, and there never were any shares or shareholders. That resolves itself into this, that parliament was induced by fraudulent recitals (introduced, it is said, by the plaintiffs,) to pass the Act which formed the company. I would observe, as to these Acts of Parliament, that they are the law of this land; and we do not sit here as a court of

[1] Part of the opinion only is given. — ED.

appeal from parliament. It was once said, — I think in Hobart — that, if an Act of Parliament were to create a man judge in his own case, the Court might disregard it. That dictum, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by parliament with the consent of the Queen, lords, and commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it; but, so long as it exists as law, the Courts are bound to obey it. The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them. The Act of Parliament makes these persons shareholders, or it does not. If it does, there is an end of the question. If it does not, that is a matter which may be raised by plea to the sci. fa. Having neglected to take the proper steps at the proper time to prevent the Act from passing into a law, it is too late now to raise any objections to it.

STATE v. KNIGHT.

SUPERIOR COURT OF NORTH CAROLINA. 1799.

[*Reported* 2 *Haywood*, 109.]

HE was indicted of passing counterfeit bills of credit, of the likeness of the genuine bills of credit of this state, in Virginia. The indictment was drawn upon the Act of 1784, c. 25, § 4: "And whereas there is reason to apprehend that wicked and ill-disposed persons resident in the neighboring states make a practice of counterfeiting the current bills of credit of this state, and by themselves or emissaries utter or vend the same with an intention to defraud the citizens of this state: Be it therefore enacted that all such persons shall be subject to the same mode of trial, and on conviction liable to the same pains and penalties as if the offence had been committed within the limits of this state, and be prosecuted in the Superior Court of any district within this state." And he was convicted.

Per curiam. This state cannot declare that an act done in Virginia by a citizen of Virginia shall be criminal and punishable in this state. Our penal laws can only extend to the limits of this State, except as to our own citizens. But granting that our Legislature could enact laws for the punishment of offences committed in Virginia, still this clause only extends by implication to acts done in Virginia; and no penal law can be construed by implication, nor otherwise than by the express letter.

He was discharged.[1]

[1] *Acc.* People v. Merrill, 2 Park, 590. — ED.

HANKS *v.* STATE.

COURT OF APPEALS OF TEXAS. 1882.

[*Reported* 13 *Tex. App.* 289.]

WHITE, P. J. There is but a single question which we think is involved in and requires discussion on this appeal.

Appellant and one P. Dillman were jointly indicted in the District Court of Travis County for the forgery of a transfer of a land certificate for a league and labor of land in the State of Texas. It is alleged in the indictment that the acts constituting the forgery were all committed in Caddo parish, in the State of Louisiana. No act or thing connected with the execution of the forgery is charged to have been done in Texas; but the crime and injury, so far as this State is concerned, are averred to consist in the fact that the said forgery in Louisiana "did then and there relate to and affect an interest in land in the State of Texas, . . . and would, if the same were true and genuine, have transferred and affected certain property, to wit, a certain land certificate, number 222, for one league and labor of land in the State of Texas," etc.

This indictment was brought under Article 451 of the Penal Code.

By Article 454 of the Code it is declared that "persons out of the State may commit and be liable to indictment and conviction for committing any of the offences enumerated in this chapter which do not in their commission necessarily require a personal presence in this State, the object of this chapter being to reach and punish all persons offending against its provisions, whether within or without this State," etc.

It was made a ground both in the motion to quash the indictment and in arrest of judgment, and is again urgently insisted upon in the able brief of counsel for appellant, that the facts alleged, if true, would constitute an offence against the sovereign State of Louisiana alone, and one of which the courts of this State would have no jurisdiction.

If the position thus assumed in behalf of appellant be correct, then the Legislature had no authority to pass the act quoted, and the same is an absolute nullity. Can this proposition be maintained? It certainly cannot be found in any constitutional inhibition, State or Federal, depriving the Legislature of the authority, and unless there is some authority of law superior to the right of a State Legislature, which could and should control the action of the latter within the scope of its constitutional powers, we cannot well conceive how its enactments, if reasonable and consistent with that power, could be held inoperative and nugatory.

Two authorities, which are to the effect that "the Legislature of one State cannot define and punish crimes committed in another State," are mainly relied upon. The leading one is the case of the State *v.* Knight, taken from 2 Haywood, and reported in Taylor's North Carolina Re-

ports, page 44. The other is People *v.* Merrill, 2 Park's Criminal Reports, 590. The defendant in the first case was indicted under a statute the words of which were: "And whereas there is reason to apprehend that wicked and ill disposed persons resident in the neighboring States make a practice of counterfeiting the current bills of credit of this State, and by themselves or emissaries utter or vend the same, with an intention to defraud the citizens of this State: Be it enacted, etc., that all such persons shall be subject to the same mode of trial, and on conviction liable to the same pains and penalties as if the offence had been committed within the limits of this State and prosecuted in the superior court of any district of this State." It was held that the jurisdiction to try in North Carolina was doubtful, and the prisoner was discharged.

Mr. Wharton, in his work on the Conflict of Laws, says: "The sturdiest advocates of the hypothesis that the *locus delicti* alone confers jurisdiction have admitted that there are cases in which a person whose residence is outside the territory may make himself, by conspiring extra-territorially to defeat its laws, infra-territorially responsible. If, for instance, a forger should establish on the Mexican side of the boundary between the United States and Mexico a manufactory for the forgery of United States securities, for us to hold that when the mischief is done he can take up his residence in the United States without even liability to arrest, would not merely expose our government to spoliation, but bring its authority into contempt. To say that in such a case the Mexican government can be relied upon to punish is no answer; because, first, in countries of such imperfect civilization, penal justice is uncertain; secondly, in cases where, in such country, the local community gains greatly by the fraud and suffers by it no loss, the chances of conviction and punishment would be peculiarly slight: and, thirdly, because all that the offender would have to do to escape justice in such a case would be to walk over the boundary line into the United States, where on this hypothesis he would go free." (Whart. Conflict of Laws, sec. 876.) Again he says: "Thus it has been held that the originator of a nuisance to a stream in one country which affects such stream in another country is liable to prosecution in the latter country; that the author of a libel uttered by him in one country and published by others in another country from which he is absent at the time, is liable in the latter country; that he who on one side of a boundary shoots a person on the other side is amenable in the country where the blow is received; that he who in one State employs an innocent agent to obtain goods by false pretenses in another State is amenable in the latter State; and that he who sells through agents, guilty or innocent, lottery tickets in another State is amenable in the State of the sale, though he was absent from such State personally. In England we have the same principle affirmed by the highest judicial authority." And he quotes Lord Campbell as saying, "that a person may, by the employment as well of a conscious as of an unconscious agent, render himself amenable to the

law of England when he comes within the jurisdiction of our courts;" and Sir R. Phillimore as saying, "It is a monstrous thing that any technical rule of venue should prevent justice from being done in this country on a criminal for an offence which was perpetrated here but the execution of which was concocted in another country." (Whart. Conflict of Laws, sec. 877. See also Adams *v.* People, 1 Comstock N. Y. 173; Commonwealth *v.* McLoon, 101 Mass. 1; Ham *v.* State, 4 Texas Ct. App. 645; Rogers *v.* The State, 10 Texas Ct. App. 655.)

Mr. Cooley, in his great work on Constitutional Limitations, treating of territorial limitation to legislative authority, says: "The legislative authority of every State must spend its force within the territorial limits of the State. . . . It cannot provide for the punishment as crimes of acts committed beyond the State boundary, because such acts, if offences at all, must be offences against the sovereignty within whose limits they have been done." But, after laying down this doctrine, in the very next sentence he says: "But if the consequences of an unlawful act committed outside the State have reached their ultimate and injurious result within it, it seems that the perpetrator may be punished as an offender against such State." (Cooley's Const. Lim., 4 ed., pp. 154–55.) If this latter rule be the law, then it is a solecism to say that the legislature cannot so declare it by express enactment.

Story, in his Conflict of Laws, says: "Although the penal laws of every country are in their nature local, yet an offence may be committed in one sovereignty in violation of the laws of another, and if the offender be afterwards found in the latter State, he may be punished according to the laws thereof, and the fact that he owes allegiance to another sovereignty is no bar to the indictment." (Story on the Conflict of Laws, 4 ed., section 625*b*.)

The offence charged in the indictment against appellant comes clearly within the terms of Article 454 of the Penal Code. Had it been committed by one of our own citizens within this State, there then could be no question as to his liability. Here, the defendant in effect says: "You may try and convict your own citizens for the same act I have committed, but you cannot try and punish me, because what I have done, though equally as violative of the spirit and letter of the law, is still not triable in your court because it was committed in another State, and your Legislature could not pass a law which could embrace me within its pains and penalties." We can see no valid reason why the Legislature of the State of Texas could not assert, as it has done in Article 454 *supra*, her jurisdiction over wrongs and crimes with regard to the land titles of the State, no matter whether the perpetrator of the crime was at the time of its consummation within or without her territorial limits. Such acts are offences against the State of Texas and her citizens only, and can properly be tried only in her courts. It may in fact be no crime against the State in which it is perpetrated; and if it is, under such circumstances as we are considering, that other State would have no interest in punishing it, and would rarely if ever do so.

When this forgery was committed in Louisiana, *eo instanti* a crime was committed against, and injury done to, the State of Texas, because it affected title to lands within her sovereignty.

Our conclusion is that the Legislature had authority to adopt the act in question; that the same is in violation of no law superior thereto; and that the jurisdiction thereby conferred can be rightly exercised by the courts of this State. The defendant appears to us to come clearly within the scope of that jurisdiction. He has been, as far as we can see, fairly and impartially tried under the law, and legally convicted according to the evidence exhibited in the record. We have found no error for which a reversal of the judgment should be had, and it is therefore affirmed. *Affirmed.*

HURT, J., dissents upon the ground that the Legislature had no authority to pass Article 454, Penal Code.

LAMAR, J., in Lake County *v.* Rollins, 130 U. S. 662 (1889). . . . We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well-settled rule which we must observe. The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.

To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it. Newell *v.* People, 7 N. Y. 9, 97; Hills *v.* Chicago, 60 Illinois, 86; Denn *v.* Reid, 10 Pet. 524; Leonard *v.* Wiseman, 31 Maryland, 201, 204; People *v.* Potter, 47 N. Y. 375; Cooley Const. Lim. 57; Story on Const. § 400; Beardstown *v.* Virginia, 76 Illinois, 34. So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. United States *v.* Fisher, 2 Cranch, 358, 399; Doggett *v.* Florida Railroad, 99 U. S. 72.

MILLER, J., in People *v.* Lacombe, 99 N. Y. 43 (1885). . . . In the interpretation of statutes, the great principle which is to control is the intention of the legislature in passing the same, which intention is to be ascertained from the cause or necessity of making the statute as well as other circumstances. A strict and literal interpretation is not always to be adhered to, and where the case is brought within the intention of the makers of the statute, it is within the statute, although by a technical interpretation it is not within its letter. It is the spirit and purpose of a statute which are to be regarded in its interpretation; and if these find fair expression in the statute, it should be so construed as to carry out the legislative intent, even although such construction is contrary to the literal meaning of some provisions of the statute. A reasonable construction should be adopted in all cases where there is a doubt or uncertainty in regard to the intention of the lawmakers. These general rules are upheld by numerous authorities. (People, ex rel. 23d Street R. R. Co. *v.* Commissioners of Taxes, 95 N. Y. 558; Burch *v.* Newbury, 10 id. 389; Oswego Starch Factory *v.* Dolloway, 21 id. 461; People *v.* N. Y. C. R. R. Co., 13 id. 78; Donaldson *v.* Wood, 22 Wend. 397; Watervliet T. Co. *v.* McKean, 6 Hill, 619; 3 Bingham, 193; Commonwealth *v.* Kimball, 24 Pick. 370.) While the rules stated are specially applicable in considering the phraseology of statutes, they may also be properly invoked where several statutes are passed relating to the same general subject. In Commonwealth *v.* Kimball (supra), it is said by Shaw, C. J., that "where any particular construction would lead to an absurd consequence, it will be presumed that some exception or qualification was intended by the legislature to avoid such conclusion." Where it is apparent that a strict construction of a statute would defeat the main purpose and object, not only of the statute, but of other legislative enactments which relate to the same subject, and which have been enacted in pursuance of and according to a general purpose of accomplishing a particular result, such interpretation should not be upheld, as it would be absurd to say that the lawmakers designed to secure a result which would be antagonistic to their plain and clear intention.

COMMONWEALTH *v.* CHURCHILL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1840.

[*Reported* 2 *Met.* 118.]

AT the last September term of the Court of Common Pleas, the defendant was convicted on four counts in an indictment, the first of which alleged that he, "at Stoughton in said County of Norfolk, on the

16th day of March last past, did sell to one —— one glass of brandy to be by him, the said ——, then and there used, consumed, and drank in the dwelling-house there situate of him the said Samuel, he the said Samuel not being then and there duly licensed, according to law, to be an innholder or common victualler; against the peace, etc., and contrary to the statute in such case made and provided." There were five other counts similar to the first, except that different kinds of spirituous liquor were alleged to have been sold to five different persons on several different days, to wit, on the 17th, 18th, 19th, 20th, and 21st of March, 1840. On two of the counts the defendant was acquitted.

The defendant filed exceptions to the ruling of *Strong*, J., before whom the trial was had: "1. Because the court instructed the jury that the 2d and 3d sections of c. 47 of the Revised Statutes, on which the indictment is founded, are binding and valid, when the defendant contends that they are unconstitutional and void. 2. Because the court instructed the jury that those sections were still in force as law, when the defendant contends that they are repealed by subsequent legislative enactments." [1]

SHAW, C. J. It appears by the record that the defendant was indicted for selling spirituous liquors without license, on the 16th day of March last, and at several times afterwards, and that upon a trial of the indictment, in the Court of Common Pleas, he was convicted. Two exceptions were taken to the directions and opinion of that court in matter of law, upon which the case has been brought before this court, pursuant to the statute. These exceptions were as follows: 1. That the 2d and 3d sections of the 47th chapter of the Revised Statutes, upon which this prosecution is founded, are unconstitutional and void. 2. Because the court instructed the jury that these sections were in force as law, at the time when the acts charged as offences were alleged to be done; whereas the defendant contended that they were repealed by a subsequent act of the legislature. Upon the first no argument has been offered, and it does not seem to be insisted on. The second depends upon the question whether the statute of 1840, c. 1, passed on the 11th of February, 1840, and which went into operation in thirty days from its passage, to wit, 13th March, 1840, simply repealing the statute of 1838, c. 157, did, by its legal operation, revive the 2d and 3d sections of the 47th chapter of the Revised Statutes. If it did, the case of the defendant was within them, the acts all being charged to have been done after the 13th of March last, and the acts themselves being made punishable by those provisions of the Revised Statutes.

It is conceded to be a maxim of the common law, applicable to the construction of statutes, that the simple repeal of a repealing law, not substituting other provisions in place of those repealed, revives the pre-existing law. As a maxim of the common law, it was in force here when the Constitution of the Commonwealth was adopted. By that

[1] The arguments of counsel and part of the opinion are omitted.

Constitution it was declared that "all the laws, which have heretofore been adopted, used, and approved in the colony, province, or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this Constitution." This Constitution has been construed as adopting the great body of the common law, with those statutes made before the emigration of our ancestors, which were made in amendment of the common law, so far as these rules and principles were applicable to our condition and form of government. Commonwealth v. Leach, 1 Mass. 59. Commonwealth v. Knowlton, 2 Mass. 534.

But it was contended, at the argument, that under this provision no principle or rule of the common law could be regarded as adopted, unless it could be shown affirmatively that it had been adjudicated before the Revolution. But we apprehend this would be much too narrow a construction. Before the Revolution, we had no regular reports of judicial decisions; and the most familiar rules and principles of law — those which lie at the foundation of our civil and social rights — could not be so proved. No; we rely on usage and tradition, and the well known repositories of legal learning, works of approved authority, to learn what are the rules of the common law; and we have no doubt that these were the great sources to which the above pregnant provision of our Constitution refers.

Taking it, then, as well established that the rules and maxims of the common law referred to in the Constitution were those which our ancestors brought with them, and which had been, to some extent, modified and adapted to our condition by the legislative jurisprudence of the colonial and provincial governments, it follows that these rules and principles were regarded as binding both upon legislators and judges in their respective departments. A part of this system are the well known rules of construction for the expounding of statutes, which are as much a part of every statute as its text. These are presumed to be known and kept in view by the legislature in framing the statute; and they must be alike regarded by judges in expounding it.

It was further insisted in the argument that the legislature could not have intended, when they repealed one license law, in effect to re-establish another. But their intentions must be ascertained by their acts alone, and not by evidence *aliunde*. We cannot possibly know the intentions of members of the legislature. It is the will of the aggregate body as expressed in the statutes which they pass, which can be regarded as having the force of law; any different construction would lead to the greatest confusion and uncertainty. The legislature are presumed to understand and intend all consequences of their own measures; and the only safe course is for courts of justice to expound the intentions of the legislature by their acts, and those acts construed by known and established rules of construction.

On the whole, the Court are of opinion that the simple repeal of St. 1838, c. 157, by that of 1840, c. 1, did revive the 2d and 3d sections of the Rev. Stats. c. 47, and that the provisions of those sections were in force at the time of the offences charged in the indictment, and that the conviction was right.

Exceptions overruled.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY *v.* TAYLOR.

SUPREME COURT OF THE UNITED STATES, 1908.

[*Reported* 210 *U. S.* 281.]

MOODY, J. The defendant in error, as administratrix of George W. Taylor, brought, in the Circuit Court of the State of Arkansas, this action at law against the plaintiff in error, a corporation owning and operating a railroad. Damages were sought, for the benefit of Taylor's widow and next of kin, on account of his injury and death in the course of his employment as brakeman in the service of the railroad. It was alleged in the complaint that Taylor, while attempting, in the discharge of his duty, to couple two cars was caught between them and killed. The right to recover for the death was based solely on the failure of the defendant to equip the two cars which were to be coupled with such draw bars as were required by the act of Congress known as the Safety Appliance Law. Act of March 2, 1893, c. 196, 27 Stat. 531. . . .

In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that "no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard." There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply, that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or

wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employe and of the public. Where an injury happens through the absence of a safe draw bar, there must be hardship. Such an injury must be an irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words. We see no error in this part of the case. But for the reasons before given the judgment must be *Reversed.*

VANDINE, PETITIONER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1828.

[*Reported* 6 *Pickering*, 187.]

PETITION for a writ of certiorari to the Municipal Court of the city of Boston. Vandine was prosecuted upon a by-law of Boston, passed in April 1826, by which it is ordained, that no person shall remove, cart or carry through any of the streets, squares, lanes, or alleys of the city, any house-dirt, refuse, offal, filth or animal or vegetable substance from any of the dwelling-houses or other places occupied by the inhabitants, in any cart, wagon, truck, hand-cart or other vehicle, unless such person so removing, etc. together with the cart, etc. shall be duly licensed for that employment and purpose by the mayor and aldermen, upon such terms and conditions as they shall deem the health, comfort, con-

venience or interest of the city require, on pain of forfeiting a sum not less than three dollars nor more than twenty.

It was proved at the trial, that Vandine transported house-dirt and offal from the yards of houses to his cart standing in the streets of the city.

Vandine being called on for his defence, it was agreed that he was an inhabitant of the town of Cambridge, and that he owned and kept there a large number of hogs.

The judge instructed the jury that the subject of the regulation was one on which it was proper for the city to legislate. . . . He further instructed the jury that, so far as by virtue of the general laws of the Commonwealth, the city council had power to make by-laws for governing the city, these regulations were binding on all persons actually resident within its limits, either for business or pleasure, and whether inhabitants or strangers.[1] . . .

PUTNAM, J., delivered the opinion of the Court. The first objection is that this by-law is not binding upon strangers, if it should be considered as binding upon the citizens of Boston.

Some by-laws are binding upon strangers as well as upon the inhabitants or members of the corporation, and some are not. The distinction is between corporations united as a fraternity for the purposes of business, having no local jurisdiction, and corporations having a territorial jurisdiction; the former have not, but the latter have power to make by-laws binding upon strangers.

For example: a by-law of the corporation of Trinity House, "that every mariner, within twenty four hours after anchorage in the Thames, put his gunpowder on shore, does not bind, because the corporation has no jurisdiction upon the Thames." Com. Dig. Bye-law, *C* 2.

In the case of Dodwell *v.* The University of Oxford, 2 Ventr. 33, the Chancellor's Court of the University made a by-law, that whoever, privileged or not privileged, should be taken walking in the streets at 9 o'clock at night, having no reasonable excuse, by the proctor, etc. should forfeit, etc. And it was held that the corporation could not make a by-law binding upon any who were not of their body. They went beyond their jurisdiction, which could not be considered as extending to the inhabitants of Oxford who were not scholars. Regard is to be had to the nature of the incorporation; if it is a banking incorporation, for example, their by-laws must be confined to the proper mode of conducting their affairs. Where the corporation has a local jurisdiction, their by-laws affect all who come within it; for example, the by-law of the city of London, that no citizen, freeman or stranger should expose any broad-cloth to sale within the city before it should be brought to Blackwell Hall to be examined whether it were saleable or not, was held binding upon strangers as well as citizens. 5 Co. 63.

So in Pierce *v.* Bartrum, Cowp. 269, a by-law of the mayor and

[1] Part of the instructions and the arguments of counsel have been omitted. — ED.

common council of the city of Exeter, that no person should slaughter beasts or keep swine within the walls of the city, was held good against the defendant, who was not free of the city, but only residing there. He was considered as an inhabitant *pro hac vice*. So where the corporation have jurisdiction over all of the same trade or profession within certain limits, as the College of Physicians have for seven miles round London; whose by-laws regulating the practice of physic are binding upon all within those limits.

The by-laws which are made by corporations having a local jurisdiction, are to be observed and obeyed by all who come within it, in the same manner as aliens and strangers within the commonwealth are bound to know and obey the laws of the land, notwithstanding they may not know the language in which they are written. They receive the benefits arising from the municipal arrangements, and are presumed to assent to them, upon the same principle which requires from them a temporary allegiance to the state for the protection it affords to them during their residence.

But it is contended that this by-law is void as it is in restraint of trade, and operates as a monopoly. Every regulation of trade is in some sense a restraint upon it; it is some clog or impediment, but it does not therefore follow that it is to be vacated. If the regulation is unreasonable, it is void; if necessary for the good government of the society, it is good.

The case cited by the counsel for the defendant from 1 Rol. Abr. 364, was of the former character. The mayor and commonalty of London made a by-law, that no carman within the city should go with his cart, without license from the wardens of such an hospital, under a certain penalty for each offence; and it was held to be a void by-law, because it was in restraint of the liberty of the trade of a carman, and it was held to be unreasonable, because it went to the private benefit of the wardens of the hospital, and was in the nature of a monopoly. Now we think that case was rightly decided; it was an act of oppression. We perceive no reason why the wardens of the hospital should have a superintendance and control of all the business of the carmen, thus laying them under a contribution at the will of the wardens.

To arrive at a correct decision whether the by-law be reasonable or not, regard must be had to its object and necessity. Minute regulations are required in a great city, which would be absurd in the country. The cases upon this subject are well collected by Baron Comyns in his Digest, title "Bye-law." It has been found to be reasonable in the city of London, to provide that brewers' drays should not be in the streets there after eleven o'clock in the morning in summer, and one in winter; that no person should unlade coals out of a barge, if he be not of the porter's company; thus in some manner restraining trade.

There have been regulations also adopted in that city, that none shall be brokers unless licensed and sworn; that none shall be hawkers without license; thus in some measure restraining the natural rights

of the subjects. Now it is contended that the by-law under consideration is in restraint, and not a mere regulation of the trade in which the defendant is engaged; that he provides as good and tight carts as the men do who are authorized by the city, in the performance of this labor. We do not perceive that there is any more reason to complain of the law requiring a license to do this work, than of the law prohibiting the keeping of livery stables in any place not licensed. One might just as well complain of the regulation which prevents him from being an auctioneer without license; and so of various other trades and concerns which it is found necessary to subject to such restriction.

The great object of the city is to preserve the health of the inhabitants. To attain that, they wisely disregard any expense which is deemed to be requisite. They might probably have these offensive substances carried out of the city without any expense, if they would permit the people from the country to take them away at such times and in such manner as would best accommodate them. Every one will see that if this business were thus managed, there would be continual moving nuisances at all times, and in all the streets of the city, breaking up the streets by their weight and poisoning the air with their effluvia. It is obvious, that the object and interest of the city, and those of the carmen, in this concern, are extremely different. But it is contended that the city authorities may regulate strangers and unlicensed persons, in regard to the number of horses and kind of carts to be employed, just as well as they can carts and the conduct of the licensed persons. It seems to us, however, that the city authority has judged well in this matter. They prefer to employ men over whom they have an entire control by night and by day, whose services may be always had, and who will be able from habit to do this work in the best possible way and time. *Practically* we think the main object of the city government will be better accomplished by the arrangement they have adopted, than by relying upon the labor of others, against whom the government would have no other remedy than by a suit for a breach of contract. The sources of contagion and disease will be speedily removed in small loads, which will not injure the pavements, nor annoy the inhabitants. We are all satisfied that the law is reasonable, and not only within the power of the government to prescribe, but well adapted to preserve the health of the city.

The direction and opinion of the judge of the Municipal Court was entirely correct.

UNITED STATES *v.* WILTBERGER.

SUPREME COURT OF THE UNITED STATES. 1820.

[*Reported* 5 *Wheaton*, 76.]

THIS was an indictment for manslaughter, in the Circuit Court of Pennsylvania. The jury found the defendant guilty of the offence with

which he stood indicted, subject to the opinion of the court, whether this court has jurisdiction of the case, which was as follows:

The manslaughter charged in the indictment was committed by the defendant on board of the American ship *The Benjamin Rush*, on a seaman belonging to the said ship, whereof the defendant was master, in the river Tigris, in the empire of China, off Wampoa, and about 100 yards from the shore, in four and a half fathoms water, and below the low water mark, thirty-five miles above the mouth of the river. The water at the said place where the offence was committed is fresh, except in very dry seasons, and the tide ebbs and flows at and above the said place. At the mouth of the Tigris the government of China has forts on each side of the river, where custom-house officers are taken in by foreign vessels to prevent smuggling. The river at the mouth and at Wampoa is about half a mile in breadth.

And thereupon, the opinions of the Judges of the Circuit Court being opposed as to the jurisdiction of the court, the question was by them stated, and directed to be certified to this court.[1]

MARSHALL, C. J. The indictment in this case is founded on the 12th section of the act, entitled, "An act for the punishment of certain crimes against the United States." That section is in these words: "And be it enacted, that if any seaman, or other person, shall commit manslaughter on the high seas, or confederate," etc., "such person or persons so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars."

The jurisdiction of the court depends on the place in which the fact was committed. Manslaughter is not punishable in the courts of the United States, according to the words which have been cited, unless it be committed on the high seas. Is the place described in the special verdict a part of the high seas?

If the words be taken according to the common understanding of mankind, if they be taken in their popular and received sense, the "high seas," if not in all instances confined to the ocean which washes a coast, can never extend to a river about half a mile wide, and in the interior of a country. This extended construction of the words, it has been insisted, is still farther opposed by a comparison of the 12th with the 8th section of the act. In the 8th section, Congress has shown its attention to the distinction between the "high seas," and "a river, haven, basin, or bay." The well-known rule that this is a penal statute, and is to be construed strictly, is also urged upon us.

On the part of the United States, the jurisdiction of the court is sustained, not so much on the extension of the words "high seas," as on that construction of the whole act, which would engraft the words of the 8th section, descriptive of the place in which murder may be committed, on the 12th section, which describes the place in which manslaughter may be committed. This transfer of the words of one section to the

[1] Arguments of counsel and part of the opinion are omitted. — ED.

other, is, it has been contended, in pursuance of the obvious intent of the legislature; and in support of the authority of the court so to do, certain maxims or rules for the construction of statutes have been quoted and relied on. It has been said, that although penal laws are to be construed strictly, the intention of the legislature must govern in their construction. That if a case be within the intention, it must be considered as if within the letter of the statute. So if it be within the reason of the statute.

The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.

It is said, that notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous indeed to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases.

After giving the subject an attentive consideration, we are unanimously of opinion that the offence charged in this indictment is not cognizable in the courts of the United States; which opinion is to be certified to the Circuit Court for the district of Pennsylvania.

CHAPTER II.

LIABILITY BASED UPON ACT.

SECTION I.

Nature of an Act.

ANONYMOUS.

KING'S BENCH, 1370.

[*Reported Lib. Assis.* 287, *pl.* 17.]

WILLIAM H. was arraigned in the King's Bench for that he had killed one J. De B. feloniously; and he pleaded not guilty. The jury came and said that the dead man struck W. from behind in the neck with his fist, so that W. fell to the ground; and while W. was on the ground the dead man drew his knife to have killed W., and W., lying on the ground, drew his own knife, and the dead man was so hasty to have killed W. that he fell on W.'s knife and so killed himself.

KNIVET, C. J. If W. had killed the dead man in self-defence W.'s chattels would have been forfeited, and W. would have sued the king to have a charter of pardon; but now it is found that the dead man killed himself, in a way, wherefore we will advise whether W. shall be put to sue the king for his charter and forfeit his goods, or not.

And then he was adjudged not guilty and his chattels not forfeited.[1]

[1] "An act is the result of an exercise of the will." GRAY, J., in Duncan v. Landis, 106 Fed. 839, 848.

"Acts are exertions of the will manifested in the external world." Professor Pound, Readings on the History and System of the Common Law, 453.

"If a movement is caused by physical compulsion, '*vis absoluta*,' as when the hand of a person is forcibly guided in making a signature, there is no act, since will is absent. But the will itself, being amenable to motives, may be coerced by threats, '*metus*,' '*vis compulsiva*,' 'duress *per minas*.' Here there is indeed an act, but one which produces none or few of the legal consequences which it would have produced had it been the result of free volition." Holland, Jurisprudence, 103.

GIBBONS *v.* PEPPER.

KING'S BENCH, 1695.

[*Reported* 1 *Ld. Raym.* 38.]

TRESPASS, assault and battery. The defendant pleads, that he rode upon a horse in the king's highway, and that his horse being affrighted ran away with him, so that he could not stop the horse; that there were several persons standing in the way, among whom the plaintiff stood; and that he called to them to take care, but that notwithstanding, the plaintiff did not go out of the way, but continued there; so that the defendant's horse ran over the plaintiff against the will of the defendant; *quae est eadem transgressio, &c.* The plaintiff demurred. And serjeant Darnail for the defendant argued, that if the defendant in his justification shews that the accident was inevitable, and that the negligence of the defendant did not cause it, judgment shall be given for him. To prove which he cited Hob. 344. Weaver *v.* Ward. Mo. 864. pl. 1192. 2 Roll. Abr. 548. 1 Brownl. prec. 188.

Northey for the plaintiff said, that in all these cases the defendant confessed a battery, which he afterwards justified; but in this case he justified a battery, which is no battery. Of which opinion was the whole court; for if I ride upon a horse, and J. S. whips the horse, so that he runs away with me, and runs over any other person, he who whipped the horse is guilty of the battery, and not me. But if I by spurring was the cause of such accident, then I am guilty. In the same manner, if A. takes the hand of B. and with it strikes C., A. is the trespasser, and not B. And, *per curiam*, the defendant might have given this justification in evidence, upon the general issue pleaded. And therefore judgment was given for the plaintiff.

REX *v.* SUTTON.

KING'S BENCH. 1736.

[*Reported Cases temp. Hardwicke*, 370.][1]

THE defendant was indicted, for that being a person of evil fame and reputation, on the 25th day of, &c., without any lawful authority, [he] had in his custody and possession two iron stamps, each of which would make or impress the figure, resemblance, and similitude of one of the sceptres made and imprest upon the current gold coin of this kingdom, called half-guineas, with an intent to make the impression of sceptres on divers pieces of silver coin of this realm, called sixpences, and to color such pieces of the color of gold, and fraudulently to utter them to his Majesty's subjects, for and as pieces of lawful and current gold coin of this realm, called half-guineas, against the peace of our Lord the King, his crown and dignity. And the indictment further sets forth, that the defendant, the day and year aforesaid, in the said county of Northampton, unlawfully had in his custody and possession one piece of silver, colored over with certain metal producing the color of gold, and feloniously made to resemble a piece of the current coin of this realm, commonly called a half-guinea, with intent to utter the said piece so colored and feloniously made to resemble a half-guinea to some of his Majesty's subjects for and as a piece of lawful and current gold coin of this realm, called a half-guinea (he, the said defendant, then and there well knowing the said piece to be silver coin colored and falsely made), to the evil example of all others, and against the peace of our Lord the King, his crown and dignity.

The defendant was tried upon this indictment at the last summer assizes, and found guilty, before my Lord HARDWICKE, C. J.; and he having some doubt what the offence was, the defendant was brought up last Michaelmas term by *habeas corpus*, and committed to Newgate, and the indictment removed into the King's Bench by *certiorari*, for the opinion of the court. And Lord HARDWICKE, C. J., then said:

As to the first part of the indictment, I doubted whether it was not high treason within the Stat. 8 & 9 Will. III. c. 26, s. 6; but it is not at all clear it would be so, because this is only to stamp part of one side of the coin, viz., putting sceptres. Then it is a misdemeanor at common law, and it did not occur to me that having in one's custody with an intent, without any act done, was a misdemeanor. As to

[1] s. c. 2 Stra. 1074.

the second part, I doubted whether any precedent could be found to show that the bare having counterfeit money in one's possession, with intention to utter it, without uttering it, was an offence.[1]

For the defendant it was argued, that the common law takes no notice of a bare intention, as a crime, unless coupled with some overt act; and therefore, though in the time of Edw. III. an intention to rob was a felony, yet even then, as appears by 3 Inst. fo. 5, there must have been some overt act to show that intention. So in Bacon's Case, 1 Sid. 230, and 1 Lev. 146, though an intention to kill the Master of the Rolls was adjudged a misdemeanor, yet there was an overt act, viz., a reward offered by the defendant for doing it: so in Holmes's Case, Cro. Car. 376, where burning his house with an intention to burn his neighbor's was held a misdemeanor; yet there was an act joined to the evil intention, viz., the burning his own house. So in the case of The King *v.* Cooper, 5 Mod. 206, and Skinner, 637, where an intention to assist the king's enemies was held a misdemeanor; yet there was an overt act laid, viz., hiring a boat for that purpose. But this indictment is really nothing more than for an intention to make an impression with such stamps as he had in his custody; and a man may be possessed of a thing without having done anything to acquire the possession; and the bare having a thing is not unlawful, unless made use of, or unless such bare possession is made a crime by a positive law, as in the case of the Statute of Will. III. [c. 26].

PER CUR. viz., PAGE, PROBYN, and LEE, JJ. Judgment must be given against the defendant.

LEE, J. It is certain that a bare intention is not punishable; and yet when joined with acts whose circumstances may be tried, it is so; so an action innocent in itself may be made punishable by an intention joined to it; as loading wool with intention to transport it, as Lord Hale says in his Hist. Plac. Coron. vol. i. p. 229. In this case the indictment is for unlawfully having in his custody stamps capable of making impression of sceptres, with intent to make such impression: now the Statute of 8 & 9 Will. III. [c. 26] has considered the having as an act; for, by the statute, it is high treason to have [knowingly any] instrument, &c., in his possession; and though the word "knowingly" is added, yet that is an act of the mind only; and the only act capable of trial in the offence against the statute is the having in possession. All that is necessary in this case is an act charged, and a criminal intention joined to the act.

The court gave judgment that the defendant do stand in the pillory at Charing-cross; and in consideration of his poverty and long imprisonment hitherto, that he do pay a fine of 6*s.* 8*d.* and be imprisoned for six months.

[1] The argument for the prosecution is omitted.

REX *v.* HEATH.

CROWN CASE RESERVED. 1810.

[*Reported Russ. & Ry.* 184.]

THIS case stood for trial before Mr. JUSTICE BAYLEY, at the Lent assizes for the county of Warwick, in the year 1810; but as the learned Judge thought it questionable whether the facts constituted any offence, and as the defendant was out upon bail, he postponed the trial by consent, that the opinion of the judges might in the meantime be taken upon the case.

The indictment contained three counts: one for uttering counterfeit money, a second for having it in his possession, knowing it to be counterfeit, with intent to circulate and put off the same among the liege subjects of our Lord the King, and to defraud them, and a third for having it in his possession knowingly, designedly, and illegally, knowing it to be counterfeit.

The only act of uttering was delivering a box packed up, containing 2800 bad shillings, and 1000 bad sixpences at a coach office at an inn at Birmingham addressed to a man at Glasgow, and the uttering was stated to be to the book-keeper at the inn.

The box was stopped at the inn.

The following authorities were referred to in support of the second and third counts, Rex *v.* Sutton, Ca. temp. Hardw. 370; Rex *v.* Scofield, Cald. 397, and Rex *v.* Higgins, 2 East. 5.

In Easter term, 31st May, 1810, this case was taken into consideration, all the judges being present. They relied much upon the authority of Rex *v.* Sutton, and the cases there cited, in forming their opinion, and were then inclined to think this a misdemeanor as stated in the second count. But on considering this case again on the first day of Trinity term ensuing, the majority of the judges seemed to be of opinion that "having in his possession" with the terms knowingly, &c. annexed to it, could not be considered an act, and that an intent without an act was not a misdemeanor, and they considered the case of Rex *v.* Sutton as untenable.[1]

[1] The result seems to be that the second and third counts of the indictment as here framed are not good, and any judgment upon them might be arrested.

But the facts seemed to afford grounds for a good indictment, by stating that the defendant acquired or procured the bad money with intent to circulate it, or packing it up or delivering to the book-keeper with intent to circulate it. MS. JUD.

See the same point decided as in the above case in Rex *v.* Stewart, Mich. T. 1814, *post*. See also Rex *v.* Collicott, Hilary T. 1812, *post*. — REP.

DUGDALE v. REGINA.

QUEEN'S BENCH. 1853.

[*Reported* 1 *Ellis & Blackburn*, 435.]

THE defendant was indicted at the Middlesex sessions. The indictment contained seven counts.[1] The defendant having been found guilty, judgment was passed upon him, separately upon each count, whereupon he brought error in this court. Joinder in error.

W. J. Metcalfe, for the plaintiff in error. The question on the first and corresponding counts is, whether the procuring obscene prints with intent to publish them be a misdemeanor at common law. The counts charge no attempt to publish. On the second and corresponding counts the question is, whether the possessing with intent to publish be a misdemeanor, no act at all being charged.[2]

Clarkson, contra, was stopped by the court.

LORD CAMPBELL, C. J. We have decisions on both sets of counts. Rex *v.* Heath, Russ. & R. 184, shows that those counts cannot be supported which merely charge a possession with intent to publish; the mere intent cannot constitute a misdemeanor when unaccompanied with any act. The case is precisely in point. But, as to the counts which charge a procuring with intent to publish, we find that in Rex *v.* Fuller, Russ. & R. 308, in Easter term, 1816, all the judges were of opinion that the procuring counterfeit coin with intent to utter was a misdemeanor, and that this might be evidenced by the possession. Must not the law be the same as to the publication of indecent prints? The circulation of counterfeit coin is a statutory offence; the circulation of indecent prints is punished at common law for the protection of morals. The procuring of such prints is an act done in the commencement of a misdemeanor, the misdemeanor being the wicked offence of publishing obscene prints.

COLERIDGE, J. I am of the same opinion. The law will not take notice of an intent without an act. Possession is no such act. But procuring, with the intent to commit the misdemeanor, is the first step towards the committing of the misdemeanor.

WIGHTMAN, J. I concur on both points. Mr. Metcalfe has clearly shown that the possession is not indictable, as not being an act; but the procuring is an act.

CROMPTON, J. Rex *v.* Fuller, Russ. & R. 308, is a distinct authority.

Judgment on the first and corresponding counts affirmed.

[1] The indictment is omitted.
[2] The argument is omitted.

SECTION II.

Omission as an Act.

MEMORANDUM.

COMMON BENCH. 1368.

[*Reported Y. B.* 43 *Edw.* 3, 33, *pl.* 38.]

THORPE, J., said that he had seen that one M. was indicted for that he had undertaken a man for a malady and that he killed the man by default of care.

REX *v.* SQUIRE.

STAFFORD ASSIZES. 1799.

[*Reported* 1 *Russ. Cr. & M.* 24.]

CHARLES SQUIRE and his wife were indicted for the murder of a boy who was bound as a parish apprentice to the prisoner Charles; and it appeared in evidence that both the prisoners had used the apprentice in a most cruel and barbarous manner, and that the wife had occasionally committed the cruelties in the absence of the husband. But the surgeon who opened the body deposed that in his judgment the boy died from debility and want of proper food and nourishment, and not from the wounds, etc., which he had received. Upon which

LAWRENCE, J., directed the jury that as the wife was the servant of the husband it was not her duty to provide the apprentice with sufficient food and nourishment, and that she was not guilty of any breach of duty in neglecting to do so; though, if the husband had allowed her sufficient food for the apprentice and she had wilfully withholden it from him, then she would have been guilty. But that here the fact was otherwise; and therefore, though *in foro conscientiæ* the wife was equally guilty with her husband, yet in point of law she could not be said to be guilty of not providing the apprentice with sufficient food and nourishment.

REX v. FRIEND.

CROWN CASE RESERVED. 1802.

[*Reported Russell & Ryan*, 20.]

THE prisoners were tried before Mr. Justice LE BLANC at the Exeter summer assizes in the year 1801, on an indictment for a misdemeanor, which charged that they did take and receive one Sarah Quill into the dwelling-house of the prisoner, John Friend, as an apprentice of the said John Friend, to be by him treated, maintained, and supported as an apprentice of him the said John Friend, and did, for a long time, have and keep her in the said house as such apprentice as aforesaid; and that during the said time they so had and kept her in the said house as such apprentice, the said prisoners, and each of them, did, with force and arms, unlawfully and injuriously, and without the consent of the said Sarah Quill, and against her will, neglect and refuse to find and provide for and to give and administer to her, being so had and kept as such apprentice as aforesaid, sufficient meat, drink, victuals, wearing apparel, bedding, and other necessaries proper and requisite for the sustenance, support, maintenance, clothing, covering, and resting the body of the said Sarah Quill; by means whereof she became emaciated and almost starved to death, and the constitution and frame of her body greatly hurt and impaired, &c.

It was proved that Sarah Quill, a girl of thirteen or fourteen years of age, went to live with Friend as an apprentice, and continued with him about a year.[1] It was objected, on behalf of the prisoners, that the evidence was not sufficient to prove the relation of master and apprentice, so as to create the legal obligation on the master to provide for the apprentice sufficient meat, clothing, &c., a breach of which would subject him to a criminal prosecution.

The learned judge permitted the prosecution to proceed, as the indictment was in other respects fully supported by the evidence. The jury found John Friend guilty, but acquitted Anne, his wife. The learned judge thought it best to pass sentence of imprisonment on the prisoner; that in case the judges should be of opinion that the above evidence did not support the indictment, a pardon might be obtained.

At a meeting of all the judges at Lord Kenyon's chambers on the first day of Michaelmas term, 1801, this case was ordered to stand over for further consideration to the first day of the next Hilary term; on that day it was further adjourned; and after Hilary term, viz. on the 25th of February, 1802, was considered at a meeting of all the judges (except Lord Kenyon and Mr. Justice Rooke). The general opinion was, that it was an indictable offence, as a misdemeanor,

[1] The statement of facts has been abridged. — ED.

to refuse or neglect to provide sufficient food, bedding, &c., to any infant of tender years unable to provide for and take care of itself (whether such infant were child, apprentice, or servant), whom a man was obliged by duty or contract to provide for, so as thereby to injure its health; but that, in the present case, the indictment was defective in not stating the child to be of tender years and unable to provide for itself. However, as in the present case, the objection was taken to the evidence not supporting the indictment, rather than to the indictment itself; and there being some difference of opinion, all the judges thought it right that the final decision should be adjourned, and that the prisoner should suffer the whole of his imprisonment.

Mr. Justice CHAMBRE thought that it was not in any manner an indictable offence, being founded wholly on contract.

REGINA v. LOWE.

WORCESTERSHIRE ASSIZES. 1850.

[*Reported* 3 *Carrington & Kirwan*, 123.]

MANSLAUGHTER. — The prisoner was indicted for the manslaughter of Thomas Tibbitts.

It appeared that he was an engineer, and that his duty was to manage a steam-engine employed for the purpose of drawing up miners from a coal pit; and when the skip containing the men arrived on a level with the pit's mouth, his duty was to stop the revolution of the windlass, so that the men might get out. He was the only man so employed on the premises. On the day in question he deserted his post, leaving the engine in charge of an ignorant boy, who, before the prisoner went away, declared himself to the prisoner to be utterly incompetent to manage such a steam-engine as the one intrusted to him. The prisoner neglected this warning, and threatened the boy, in case he refused to do as he was ordered. The boy superintended the raising of two skips from the pit with success, but on the arrival at the pit's mouth of a third, containing four men, he was unable to stop the engine, and the skip being drawn over the pulley, the deceased, who was one of the men, was thrown down into the shaft of the pit and killed on the spot.

It appeared that the engine could not be stopped "in consequence of the slipper being too low," an error which it was proved that any competent engineer could have rectified, but which the boy in charge of the engine could not.

Huddleston, for the prisoner, contended that a mere omission or neglect of duty could not render a man guilty of manslaughter, and

he cited the cases of Rex *v.* Green, 7 C. & P. 156, and Rex *v.* Allen, 7 C. & P. 153.

LORD CAMPBELL, C. J. I am clearly of opinion that a man may, by a neglect of duty, render himself liable to be convicted of manslaughter, or even of murder. *Verdict guilty.*

REGINA *v.* CONDE.

CENTRAL CRIMINAL COURT. 1867.

[*Reported* 10 *Cox C. C.* 547.]

JOHN GEORGE CONDE and Mary Conde were indicted for and charged, upon the coroner's inquisition, with the wilful murder of William Conde.[1]

George Charles Kernott, licentiate of the Apothecaries' Company, proved that the deceased died from starvation; death, no doubt, having been accelerated by beatings.

CHANNELL, B., in summing up the case to the jury directed them as follows: If the prisoners or either of them wilfully withheld necessary food from the deceased, with a wilful determination, by withholding sustenance which was requisite, to cause his death, then the party so withholding such food is guilty of murder. If, however, the prisoners had the means to supply necessaries, the want of which had led to the death of the deceased, and having the means to supply such necessaries, negligently though not wilfully withheld food which if administered would have sustained life, and so caused the death of the deceased, then that would amount to the crime of manslaughter in the person so withholding the food.

Mary Conde guilty of manslaughter.
John George Conde not guilty.

REGINA *v.* SMITH.

CARLISLE ASSIZES. 1869.

[*Reported* 11 *Cox C. C.* 210.]

THOMAS SMITH was indicted for the manslaughter of Richard Gibson, at Dearham, on the 8th of February, 1869, under the following circumstances:

[1] Most of the evidence presented in this case has been omitted.

The prisoner was employed by a Mr. Harrison, an extensive colliery proprietor near Dearham, and who was also the owner of a tramway which crossed the Maryport and Carlisle turnpike road. It was the prisoner's duty to give warning to any persons when any trucks might cross the said road. The tramway was in existence before the road, and in the act by which the road was made there was no clause imposing on Mr. Harrison the duty of placing a watchman where the tramway crossed the road. On the 8th of February, 1869, the deceased was crossing the tramway, having received no warning that any trucks were about to cross the road. As he was crossing, however, he was knocked down by some trucks and was killed. On inquiry it appeared that the prisoner was absent from his post at that time, although he had strict orders never to be absent.

Campbell Foster, for the prisoner, contended that, it being an act of omission such omission ought to have been stated in the indictment.

The learned judge [LUSH, J.] held that under the words "did feloniously kill and slay" it was unnecessary to state in the indictment that it was an act of omission on the part of the prisoner which caused the death of the deceased.

Campbell Foster then contended that the facts of the case disclosed no duty between the prisoner and the public.

In this the learned judge concurred, saying that, there being no clause in the act compelling Mr. Harrison to place a watchman where the tramway crossed the road, the prisoner was merely the private servant of Mr. Harrison; and that consequently his negligence did not constitute such a breach of duty as to make him guilty of manslaughter.

Prisoner discharged.

REGINA *v.* WHITE.

COURT FOR CROWN CASES RESERVED. 1871.

[*Reported L. R.* 1 *C. C.* 311.]

CASE stated by the Chairman of the Hants Quarter Sessions.

Indictment under 24 & 25 Vict. c. 100, s. 27 (1), for unlawfully and wilfully abandoning and exposing a child under the age of two years, whereby the life of the child was endangered.

At the trial at Winchester, it appeared from the evidence that Emily White (the wife of William White), who was not included in the indictment, was the mother of the child, which was about nine months old at the time mentioned in the indictment. On the 19th of October, 1870, she had an interview with her husband, from whom she had been living apart since the 11th of August of the same year, and asked him if he intended to give her money or victuals; he passed by her without an-

swering, and went into his house; this was about 7 P. M. His mother, the prisoner, Maria White, shut the wicket of the garden, and forbade his wife from coming in; the wife then went to the door of the house, laid the child down close to the door, and called out, "Bill, here's your child, I can't keep it — I am gone." She left, and was seen no more that night. Shortly after, William White came out of the house, stepped over the child, and went away. About 8.30 P. M. two witnesses found the child lying in the road, outside of the wicket of the garden, which was a few yards from the house-door; it was dressed in short clothes, with nothing on its head; they remained at the spot till about 10 P. M., when William White came home. They told him that his child was lying in the road; his answer was, "It must bide there for what he knew, and then the mother ought to be taken up for the murder of it." Another witness, Maria Thorn (the mother of his wife), deposed also to the fact that at about the same time, in answer to her observation that he ought to take the child in, he said, "He should not touch it — those that put it there must come and take it." She then went into the house. About 11 P. M., one of the two witnesses went for a police constable, and returned with him to the place about 1 A. M., when the child was found lying on its face in the road, with its clothes blown over its waist, and cold and stiff. The constable took charge of it, and by his care it was restored to animation. At 4.30 A. M. the constable went to the house, and asked William White if he knew where his child was; he said, "No." On being asked if he knew it was in the road, he answered, "Yes." It appeared that, during the time which elapsed between William White leaving his house, about 7 P. M., and his return, about 10 P. M., he had been to the police constable stationed at Beaulieu, and told him that there had been a disturbance between him and his wife, and wished him to come up and settle it, but he did not say anything about the child.

The prisoner's counsel objected that upon these facts there was no evidence of abandonment or exposure, under the Act, by William White.

He also objected that there was no evidence against John White and Maria White.

The Court were of opinion that there was no evidence against the two last-named prisoners, but overruled the objection as to William White, as to whom the case was left to the jury, who found him guilty.

The question for the Court was, whether the prisoner, William White, was properly convicted upon the facts as above stated.

April 29. No counsel appeared. *Cur adv. vult.*

May 6. BOVILL, C. J. We have considered this case, and we are of opinion that the conviction was right, and ought to be affirmed. The prisoner was indicted, under 24 & 25 Vict. c. 100, s. 27, for unlawfully abandoning and exposing a child, under the age of two years, whereby its life was endangered. On the facts stated in the case the objection

was taken that there was no evidence of abandonment or exposure. Now, the prisoner was the father of the child, and as such was entitled to the custody and control of it, and was not only morally but legally bound to provide for it. Then it appears that when the child was lying at the door he saw it, stepped over it, and left it there. Afterwards, when the child was in the road, he knew it was there. I am clearly of opinion that there was evidence here upon which the jury might and ought to convict the prisoner. Instead of protecting and providing for the child, as it was his duty to do, he allowed it to remain lying, first at his door, and afterwards in the road, insufficiently clothed, and at a time of year when the result was likely to be the child's death. I think, therefore, he was guilty both of abandonment and exposure.

MARTIN, B. I am of the same opinion, though I have entertained some doubt upon the question. The statute makes it an offence unlawfully to abandon or expose a child, and, construing these words according to their natural meaning, I thought at first that they could only apply to persons who had had the actual custody and possession of the child. But as the prisoner here was the father of the child, entitled to its custody and legally bound to its protection, I do not differ from the rest of the Court.

BRAMWELL, B. I am of the same opinion. If the person who had had the actual custody of the child, and who left it at its father's door, had been a stranger with whom it had been left at nurse, there could, I think, have been no doubt about the case; and I do not think the fact that it was the mother makes any difference.

BLACKBURN, J. I am of the same opinion. The question turns upon the meaning of the words "abandon or expose" in the statute. The Court, before whom the prisoner was tried, were right in directing the acquittal of the two other persons accused, because there was no legal duty upon them to protect the child, but only a duty of imperfect obligation. But the father's case is different; for upon him there is a strict legal duty to protect the child. And when the child is left in a position of danger of which he knows, and from which he has full power to remove it, and he neglects his duty of protection, and lets the child remain in danger, I think this is an exposure and abandonment by him. If the child had died, the facts were such that a jury might have convicted him of murder, though they might have taken a more merciful view, and found him guilty only of manslaughter; and as the child, though its life was endangered, did not die, the case is within the section.

CHANNELL, B. My Brother Byles, who was a member of the Court when the case was first before the Court, concurs in the judgment; and, having had an opportunity of considering the case this morning, I am of the same opinion. *Conviction affirmed.*

REGINA v. DOWNES.

CROWN CASE RESERVED. 1875.

[*Reported* 13 *Cox C. C.* 111.]

CASE reserved for the opinion of this court by BLACKBURN, J.[1]

1. The prisoner was indicted at the Central Criminal Court for the manslaughter of Charles Downes.

2. It appeared on the trial before me by the evidence that Charles Downes was an infant who, at the time of his death, was a little more than two years old. The child had been ill, and wasting away for eight or nine months before its death. The prisoner, who resided at Woolwich, was the father of the deceased, and had during the whole of this time the custody of the child.

3. The prisoner was one of a sect who call themselves "The Peculiar People."

4. During the whole period of the child's illness he did not procure any skilled advice as to the treatment of the child, but left it to the charge of women who belonged to his sect, and called in at intervals George Hurry, an engine driver, who prayed over the child and anointed it with oil.

5. The reason of this course of conduct was explained by George Hurry, who was called as a witness.

6. He stated that the Peculiar People never called in medical advice or gave medicines in case of sickness. They had religious objections to doing so. They called in the elders of the church, who prayed over the sick person, anointing him with oil in the name of the Lord. This he said they did in literal compliance with the directions in the 14th and 15th verses of the fifth chapter of the Epistle of St. James, and in hope that the cure would follow.

7. This course was pursued with regard to the deceased infant during its illness. The prisoner consulted the witness Hurry as to what was the matter with the child, and as to what should be given to it. They thought it was suffering from teething; and he advised the parents to give it port wine, eggs, arrowroot, and other articles of diet which he thought suitable for a child suffering from such a complaint, all of which were supplied accordingly. There was no evidence that this treatment was mischievous, and though this was probably not logically consistent with the doctrines of his sect as described by him, I saw no reason to doubt that it was all done in perfect sincerity.

10. It was admitted on the part of the prosecution that the child was kindly treated, kept clean, and furnished with sufficient food, and nursed kindly by the mother and the women of the sect.

[1] Part of the statement of the case, argument of counsel, and the opinion of MELLOR, J., are omitted.

11. Evidence was then given that the prisoner had sufficient means to procure skilled advice, which was easily to be obtained at Woolwich. That neither he nor the elder had any competent skill. The disease of which the child died having nothing whatever to do with teething, but being chronic inflammation of the lungs and pleura, which was of long standing, and was a disease which might have been cured at any time if competent advice had been obtained, probably though not certainly, would have been so cured, if the advice had been called in in the early stages of the complaint.

12. The prisoner in his own defence said that he sincerely believed that by abstaining from calling in medical aid he gave the child the best chance of recovery, as, if he showed a want of faith he thought he could not rely on the promise which he thought was given.

13. The prisoner had no counsel.

15. I told the jury that the law casts on the father who has the custody of a helpless infant a duty to provide according to his ability all that is reasonably necessary for the child, including, if the child is so ill as to require it, the advice of persons reasonably believed to have competent medical skill, and that if death ensues from the neglect of this duty it is manslaughter in the father neglecting the duty.

I told them that I did not, as at present advised, think it any defence that the prisoner sincerely believed that he ought not to provide such advice, nor that he believed that he was doing the best for the child if he had not, in fact, competent skill and knowledge himself. After explaining this more fully I asked the jury four questions which to prevent any risk of mistake, I reduced to writing and handed to them. They answered all in the affirmative.

16. The following is a copy of the writing I handed to the jury and their answers.

Did the prisoner neglect to procure medical aid for the helpless infant when it was in fact reasonable so to do, and he had the ability? — Yes.

Was the death caused by that neglect? — Yes.

Unless both of these are proved he is not guilty. If both proved find him guilty, but then say further,

Did the prisoner *bonâ fide*, though erroneously, believe that medical advice was not required for the child? — Yes.

Or *bonâ fide* believe that it was wrong to call in medical aid? — Yes.

I thereupon directed the verdict of guilty to be entered, and admitted the prisoner to bail.

The question for the opinion of this court is whether the conviction so obtained on this direction and those findings should stand or be set aside. COLIN BLACKBURN.

No counsel was instructed to argue for the prisoner.

D. Straight, for the prosecution. The 31 & 32 Vict. c. 122, s. 37, makes it an offence for a parent wilfully to neglect to provide adequate food, clothing, medical aid, or lodging for a child under fourteen years

of age in his custody whereby the health of the child is, or has been, or is likely to be seriously injured. [MELLOR, J. The words of the section "wilfully neglect" mean intentionally or purposely omit to call in medical aid. LORD COLERIDGE, C. J. In Reg. v. Wagstaffe, 10 Cox C. C. 530, an indictment for manslaughter against parents of the same religious sect as the prisoner in this case for neglecting to provide medical aid for the child, who died in consequence of such neglect, Willes, J., upon similar facts, seems to have been of opinion that the indictment could not be sustained, but that was before the 31 & 32 Vict. c. 122, s. 37, passed. And in the case of Reg. v. Hines,[1] before Pigott, B., that statute was not brought to his attention.]

COLERIDGE, C. J. I think that this conviction should be affirmed. For my own part, but for the statute 31 & 32 Vict. c. 122, s. 37, I should have much doubt about this case, and should have desired it to be further argued and considered. Perhaps it is enough to say that the opinions of Willes, J., and Pigott, B., are deserving of grave consideration. The statute 31 & 32 Vict. c. 122, s. 37, however, is a strong argument in favor of the conviction. By that enactment it is made an offence pun-

[1] Reg. v. Hines was an indictment against Hines for unlawfully endangering the life of his child, aged two years, by omitting to provide proper and sufficient medicine. At the opening of the case, Baron Pigott expressed a very strong opinion that it could not be sustained. Mr. Poland referred to Russell on Crimes, p. 80, to the case of Reg. v. Smith, 8 C. & P., and to Reg. v. Hurry, Central Criminal Court Reports, vol. 76, p. 63. After hearing the evidence in the case, and Mr. Poland in support of it, Pigott, B., said, "I am of opinion that there is no case to go to the jury of any crime; I think it is one of those cases in which a parent, instead of being guilty of anything like culpable negligence, has done everything that he believed to be necessary for the good of his child. That he may be one of those persons who have very perverted views and very superstitious views, and may be altogether mistaking that doctrine of Scripture from which he has taken his course of proceeding in this case, may be perfectly true; but that there is anything in the nature of a duty neglected, that is, a duty which he believed or knew to be such, in this instance, I am clearly of opinion the evidence does not show. On the contrary, he believed his duty to be in the direction in which he acted, and he carried out that duty to the utmost of his ability. He may altogether have mistaken what his duty was; still I believe it was an honest mistake. It may be an ignorant mistake, in all probability it is the result of ignorance and superstition, but certainly there is not a trace of anything like an intentional omission of duty or a culpable omission of duty within the meaning of that expression as used in the criminal law. I am clearly of opinion that it is not a case for an indictment, nor a case for a judge to deal with in a Criminal Court. If the Legislature (as they have done in dealing with the case of the prevention of small pox), are minded to pass a law on the subject, that is a different matter, and it would be quite right then that persons should be compelled to conform to it, although they themselves may personally object to it, because it is the law of the society in which they live, and they are bound by that law if society chooses to enact it. But I am clearly of opinion that no judge sitting in a Criminal Court, without any direction or enactment of the Legislature, would be justified in saying that a parent who exercised his best judgment, though a perverted one, in dealing with his child by nursing and care instead of calling in a doctor to apply blisters, leaches, and calomel, was guilty of criminal negligence. I may say that I had an opportunity before coming into court, knowing that this case was coming on, of speaking of it to Mr. Justice Quain, and the learned Recorder, and they quite concur in the view I have propounded and upon which I am acting."

ishable summarily if any parent wilfully neglects to provide (*inter alia*) medical aid for his child being in his custody under the age of fourteen years, whereby the health of such child shall have been or shall be likely to be seriously injured. That enactment I understand to mean that if any parent intentionally, *i. e.*, with the knowledge that medical aid is to be obtained, and with a deliberate intention abstains from providing it, he is guilty of an offence. Under that enactment upon these facts the prisoner would clearly have been guilty of the offence created by it. If the death of a person results from the culpable omission of a breach of duty created by the law, the death so caused is the subject of manslaughter. In this case there was a duty imposed by the statute on the prisoner to provide medical aid for his infant child, and there was the deliberate intention not to obey the law; whether proceeding from a good or bad motive is not material. The necessary ingredient to constitute the crime of manslaughter existed, therefore, in this case; and for that reason this conviction ought to be affirmed.

BRAMWELL, B. I am of the same opinion. The 31 & 32 Vict. c. 122, s. 37, has imposed a positive and absolute duty on parents, whatever their conscientious or superstitious opinions may be, to provide medical aid for their infant children in their custody. The facts show that the prisoner thought it was irreligious to call in medical aid, but that is no excuse for not obeying the law.

MELLOR and GROVE, JJ., and POLLOCK, B., concurred.

Conviction affirmed.

REGINA *v.* INSTAN.

CROWN CASE RESERVED. 1893.

[*Reported* [1893] 1 *Q. B.* 450.]

CASE stated by DAY, J.

Kate Instan was tried before me at the last assizes for the county of Worcester upon a charge of feloniously killing one Ann Hunt. The prisoner, who is between thirty and forty years of age and unmarried, had no occupation and no means of her own of living. She was a niece of the deceased.

At the time of the committal of the alleged offence, and for some time previous thereto, she had been living with and had been maintained by the deceased. Deceased was a woman of some seventy-three years of age, and until a few weeks before her death was healthy and able to take care of herself. She was possessed of a small life income, and had in the house in which she lived some little furniture, and a few other articles of trifling value. The two women lived together in a house taken by the deceased; no one lived with them or in any way attended to them.

The deceased shortly before her death suffered from gangrene in the leg, which rendered her during the last ten days of her life quite unable to attend to herself or to move about or to do anything to procure assistance. No one but the prisoner had previous to the death any knowledge of the condition in which her aunt thus was. The prisoner continued to live in the house at the cost of the deceased, and took in the food supplied by the tradespeople; but does not appear to have given any to the deceased, and she certainly did not give or procure any medical or nursing attendance to or for her, or give notice to any neighbor of her condition or wants, although she had abundant opportunity and occasion to do so.

The body of the deceased was on August 2, while the prisoner was still living in the house, found much decomposed, partially dressed in her day clothes, and lying partly on the ground and partly prone upon the bed. The death probably occurred from four to seven days before August 3, the date of the post-mortem examination of the body. The cause of death was exhaustion caused by the gangrene, but substantially accelerated by neglect, want of food, of nursing, and of medical attendance during several days previous to the death. All these wants could and would have been supplied if any notice of the condition of the deceased had been given by the prisoner to any of the neighbors, of whom there were several living in adjoining houses, or to the relations of the deceased, who lived within a few miles. It was proved that the prisoner, while the deceased must have been just about dying, had conversations with neighbors about the deceased, but did not avail herself of the opportunities thus afforded of disclosing the condition in which she then was.

At the close of the case it was objected on behalf of the prisoner that there was no evidence of any legal duty such as would bind the prisoner to give or to procure any food, or nursing, or attendance to or for the deceased, or to give any notice to any one that such was required. I thought it better not to stop the case, but to leave it to the jury to say whether, having regard to the circumstances under which the prisoner lived with the deceased, and continued to occupy the house, and to take the food provided at the expense of the deceased, while the deceased was, as she knew, unable to communicate with any other person and thus to procure necessaries for herself, the prisoner did or did not impliedly undertake with the deceased either to wait upon and attend to her herself, or to communicate to persons outside the house the knowledge of her helpless condition; and I told them that if they came to the conclusion that she did so undertake, and that the death of the deceased was substantially accelerated by her failure to carry out such undertaking, they might find the prisoner guilty of manslaughter, but that otherwise they should acquit her. The jury found the prisoner guilty.

If the facts above stated do not afford evidence of the existence of any such undertaking or duty, then the conviction is to be quashed; if otherwise, it is to stand.

Vachell, for the prisoner. There was no legal duty imposed upon the prisoner to provide food or attendance for the deceased during the last ten days of her life; there was certainly no such duty before that time, for the deceased was the head of the household and able to help herself. Such a duty as is here sought to be enforced can only arise by virtue of a statute or a contract, or at common law. It must be conceded that there was no statutory duty, neither was there any duty at common law; there is no authority for the existence of any such common law duty in the case of a person of full age; in such a case the duty can only arise in respect of an undertaking, express or implied. In Rex *v.* Friend it was held to be an indictable offence to refuse or neglect to provide sufficient food, bedding, &c., to an infant of tender years, unable to provide for and take care of itself, whom a man was obliged by duty or contract to provide for; but the decision was in terms confined to such cases, and the indictment was held to be defective in not stating the child to be of tender years and unable to provide for itself. In Reg. *v.* Shepherd it was held that there was no duty upon a woman to procure a midwife for her daughter, a girl of eighteen, and that she could not be convicted of manslaughter for omitting to do so. In his judgment, Erle, C. J., says: "Here the girl was beyond the age of childhood, and was entirely emancipated." In the case of a person of full age such a duty may indeed arise out of an express or implied undertaking: Reg. *v.* Marriott, where a man was convicted of the manslaughter of an elderly and infirm woman, whom he had taken home to live in his house, promising to make her happy and comfortable. In summing up in that case, Patteson, J., said: "The cases which have happened of this description have been generally cases of children and servants, where the duty was apparent. This is not such a case; but it will be for you to say whether, from the way in which the prisoner treated her, he had not by way of contract, in some way or other, taken upon him the performance of that duty which she, from age and infirmity, was incapable of doing." In the present case there was no evidence of any contract or undertaking by the prisoner to take care of her aunt, though no doubt she was under a moral obligation to do so.

[HAWKINS, J. Why should not a contract be implied from such circumstances as those in this case? Suppose two people agreed to live together for their mutual benefit, would not the mere fact of their living together be evidence from which an undertaking might be implied?]

[CAVE, J. When the prisoner took in food paid for with the deceased's money, she had no right to apply it all for her own use. Did she not then undertake a duty towards the deceased?]

Not by way of contract so as to raise a legal duty; it was nothing more than a duty of imperfect obligation.

LORD COLERIDGE, C. J. We are all of opinion that this conviction must be affirmed. It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a

moral obligation. A legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement. There can be no question in this case that it was the clear duty of the prisoner to impart to the deceased so much as was necessary to sustain life of the food which she from time to time took in, and which was paid for by the deceased's own money for the purpose of the maintenance of herself and the prisoner; it was only through the instrumentality of the prisoner that the deceased could get the food. There was, therefore, a common law duty imposed upon the prisoner which she did not discharge.

Nor can there be any question that the failure of the prisoner to discharge her legal duty at least accelerated the death of the deceased, if it did not actually cause it. There is no case directly in point; but it would be a slur upon and a discredit to the administration of justice in this country if there were any doubt as to the legal principle, or as to the present case being within it. The prisoner was under a moral obligation to the deceased from which arose a legal duty towards her; that legal duty the prisoner has wilfully and deliberately left unperformed, with the consequence that there has been an acceleration of the death of the deceased owing to the non-performance of that legal duty. It is unnecessary to say more than that upon the evidence this conviction was most properly arrived at.

HAWKINS, CAVE, DAY, and COLLINS, JJ., concurred.

Conviction affirmed.

REX *v.* PITTWOOD.

TAUNTON ASSIZES. 1902.

[*Reported* 19 *Times Law Rep.* 37.]

PHILIP PITTWOOD was charged with the manslaughter of Thomas White, and a coroner's inquisition for the same offence was also returned.

It appeared that the prisoner occupied a hut as a gate-keeper on the Somerset and Dorset Railway, near Glastonbury. His duties were to keep the gate shut whenever a train was passing along the line, which was a single line, and not many trains used to pass during the day. His hours of duty were from 7 in the morning till 7 P. M. On July 18, at about 2.45 in the afternoon, White was in a hay cart crossing the line with several others, when a train came up and hit the cart, White being struck and killed. Another man was also seriously injured, while the three remaining men, by jumping out of the cart, saved their lives. A number of witnesses were called to show that it was really only an

accommodation road, and not a public road. It was shown that the train was going at a very fair rate, and it was impossible to stop it, as the cart was only seen by the driver a few yards from his train. The prisoner gave evidence before the coroner, and his deposition was put in, and in it he stated that he had put the gate open about ten minutes before to let a cart pass, and had propped it open, had forgotten to shut it again, and had gone to have some luncheon. For the defence it was suggested that there was only mere inattention on the part of the prisoner, and no criminal negligence. The jury returned a verdict of *guilty*. Mr. JUSTICE WRIGHT passed a sentence of three weeks' imprisonment in the second division, but allowed the prisoner out on his own recognizance to hear the points of law to be argued in arrest of judgment.

Mr. *Simon*, on behalf of the prisoner, submitted that there was no evidence of negligence to go to the jury; that negligence in law is want of due care; that in the present case the prisoner was not bound to take any care; that it was necessary that the duty to take care should be towards the person who complained; and that, in the present case, the prisoner only contracted with his employers, — the railway company. He quoted Reg. *v.* Smith, 11 Cox, 210, decided by Mr. Justice Lush. Further, he submitted that the man who was killed was not the man for whom the gate was opened. [Mr. JUSTICE WRIGHT. — The jury have not had to consider whether this was an accommodation road or not. That question could not be left to them.]

Mr. JUSTICE WRIGHT, without calling upon the prosecution, gave judgment. He said he was clearly of opinion that in this case there was gross and criminal negligence, as the man was paid to keep the gate shut and protect the public. In his opinion there were three grounds on which the verdict could be supported: (1) There might be cases of misfeasance and cases of mere non-feasance. Here it was quite clear there was evidence of misfeasance, as the prisoner directly contributed to the accident. (2) A man might incur criminal liability from a duty arising out of contract. The learned Judge quoted in support of this, Reg. *v.* Nicholls, 13 Cox, 75; Reg. *v.* Elliott, 16 Cox, 710; Reg. *v.* Benge, 4 F. & F. 504; Reg. *v.* Hughes, Dears. & B. C. C. 248. The strongest case of all was, perhaps, Reg. *v.* Instan (1893), 1 Q. B. 450, and that case clearly governed the present charge. (3) With regard to the point that this was only an occupation road, he clearly held that it was not, as the company had assumed the liability of protecting the public whenever they crossed the road. There was no ground for stating a case on any of the grounds urged on behalf of the prisoner.

The prisoner thereupon surrendered to undergo the sentence that had been passed upon him.

ANDERSON v. STATE.

TEXAS COURT OF APPEALS. 1889.

[*Reported* 27 *Tex. App.* 177.]

THE conviction in this case was for negligent homicide, and the penalty assessed against each of the appellants was a fine of two hundred and fifty dollars.

The indictment impleaded O. Torgerson, engineer, J. A. DeCogne, fireman, and the appellants as brakemen on engine number eleven of the Houston, East & West Texas Railway Company, charging them with negligent homicide of the first degree, and alleging in substance that on the seventh day of February, 1887, while engaged as workmen in running said engine and tender on said railroad, said Torgerson, DeCogne, Anderson, and Woods did back said engine and tender negligently and carelessly, without ringing the bell or blowing the whistle, and without giving any warning, and without first looking to see if any person was likely to be injured thereby, and by said negligence and carelessness one Sing Morgan was struck by said engine and tender so run, and the death of said Morgan was caused by said negligence and carelessness — the said Morgan being at the time in a position to be struck by said engine and tender which fact would have been known by said Torgerson, DeCogne, Anderson, and Woods if they had used that degree of care and caution which a man of ordinary prudence would use under like circumstances, there being then and there an apparent danger of causing the death of said Morgan and of other persons passing on said railroad and highway.[1]

WILLSON, J. . . . As we view the evidence and the law applicable thereto, this conviction is not warranted. These appellants were brakemen. They had no control whatever of said engine and tender. They were riding upon the same for the purpose merely of performing their specific duties as brakemen, which duties had no connection with or relation to the homicide. It was the exclusive duty of the engineer and fireman to operate said engine carefully; to look out for obstructions upon the track; to give signals of danger when necessary. With these duties appellants were in no way concerned. They had no right to start the engine in motion, to blow the whistle, to ring the bell, to stop the engine, or otherwise to control its movements. They performed no act which connected them with the death of the child. It is only for a supposed omission of duty on their part that they have been convicted of negligent homicide. They omitted to look out for obstructions on the track. They might have seen the child in time to save its life, but they omitted to see him. Or if they did see him they omitted to stop the train, or to signal the engineer to stop it.

[1] The evidence and part of the opinion dealing with the form of the indictment and the admissibility of certain evidence are omitted. — ED.

Were these omissions criminal, within the meaning of the statute defining negligent homicide? We think not, because, to constitute criminal negligence or carelessness, there must be a violation of some duty imposed by law directly or impliedly, and with which duty the defendant is especially charged. Mr. Wharton says: "Omissions are not the basis of penal action, unless they constitute a defect in the discharge of a responsibility with which the defendant is especially invested." (Wharton on Hom. sec. 72.) Again, this author says, in treating of omissions by those charged with machinery, etc.: "The responsibility of the defendant which he thus fails to discharge must be exclusive and peremptory. A stranger who sees that unless a railway switch is turned, or the car stopped, an accident may ensue, is not indictable for not turning the switch or stopping the car. The reason for this is obvious. To coerce, by criminal prosecutions, every person to supervise all other persons and things, would destroy that division of labor and responsibility by which alone business can be safely conducted, and would establish an industrial communism, by which private enterprise and private caution would be extinguished. Nothing can be effectually guarded when everything is to be guarded by everybody. No machinery could be properly worked if every passerby were compelled by the terror of a criminal prosecution to rush in and adjust anything that might appear to him to be wrong, or which was wrong, no matter how it might happen to appear. By this wild and irresponsible interference even the simplest forms of machinery would be speedily destroyed." (Ibid. sec. 80.) And upon the subject of omission to give warning of danger, the same author says: "The test here is, is such notice part of an express duty with which the defendant is exclusively charged? If so, he is responsible for injury which is the regular and natural result of his omission; but if not so bound, he is not so responsible." (Ibid. sec. 81.)

These rules of the common law are not inconsistent with our statute, but are in harmony therewith, as we construe it. As we understand both the common law and the statute, there can be no criminal negligence or carelessness by omission to act, unless it was the especial duty of the party to perform the act omitted. Negligence or carelessness by omission presupposes duty to perform the act omitted, and can not, in law, be imputed except upon the predicate of duty.

In this case the evidence is uncontradicted and clear that appellants did not do any act or omit to do any legal duty, with reference to the deceased child. In law they are no more responsible for the death of the child than any other person who was present and witnessed the accident. They were strangers to the transaction, in contemplation of the law, because they were not charged with any duty with respect to it.

We are of the opinion that the judgment of conviction is contrary to the law and the evidence, and therefore said judgment is reversed and the cause is remanded. *Reversed and remanded.*

BEATTIE *v.* STATE.

SUPREME COURT OF ARKANSAS. 1904.

[*Reported* 73 *Ark.* 428.]

GEORGE BEATTIE, a resident of Missouri, was arrested, tried and convicted on a charge that, being a resident of the State of Missouri, he did, in the county of Sharp and State of Arkansas, in May, 1904, herd, graze, and permit to run at large about nineteen head of cattle. He was convicted, and fined $100 before a justice of the peace. He took an appeal to the Circuit Court, and on the trial there the Circuit Judge made the following findings of law and fact:

"In this case I find that the defendant, George Beattie, was a non-resident of the State of Arkansas, and was a resident of the State of Missouri; that he owned land in the latter State; that his land, or at least a part of it, had as its south line, the State line, and that his residence was in the State of Missouri about one-half of one-quarter of a mile north of the State line. The evidence further shows that he owned eighty acres of land in Arkansas. The testimony shows that he would turn his cattle out of the inclosure in Missouri, knowing that they would go across the line in the State of Arkansas; that he would go and drive them out of said State for the purpose of salting them, and then turn them out when they would go across into Arkansas, and that this was done repeatedly during the year prior to the filing of the information herein.

"I find that if defendant turned his stock on the range in Missouri with no one to look after them, knowing that they were in the habit of going into Arkansas, and that they did go into Arkansas, he would be guilty of a violation of this statute, although he may have been in the State of Missouri during the time.

"I further find that if he thus permitted his stock to enter the State of Arkansas, and went into said State for the purpose of driving them home to be salted, and then turned them out again, he would be guilty."

The court also declared the law to be that the fact that a non-resident owned land in this State did not authorize him to herd, graze, or permit his stock to run at large in this State, though he had the right to pasture them on his own land.

The court gave other instructions of law on motion of the State and defendant, but they need not be set out here, for the substance of them is contained in the above findings.

The court found that defendant was guilty, and assessed his fine at $100. Defendant appealed.

RIDDICK, J. This is an appeal from a judgment convicting a nonresident defendant and assessing a fine of $100 against him for permitting his cattle to run at large in this State.

Now, it is clear that our statute on that subject does not forbid a nonresident, whose cattle have strayed or come of their own volition into this State, from driving them out again. It is equally clear that it does not subject a resident of Missouri, who turns his cattle at large in that State, to a criminal prosecution and fine if the cattle afterwards come into this State; for the Legislature of this State has no power to punish a resident of Missouri for a lawful act done in that State. Nor do we think that it would alter the case if the defendant knew, at the time he turned them at large in Missouri, that they would probably come into Arkansas, for the Legislature of this State cannot compel the residents of Missouri who live near the State line to keep their cattle in inclosed lots or fields in order to prevent them from coming into this State, and we do not think that was the intention of this statute to do so. The people of Missouri have the right to permit their cattle to run at large in that State, unless forbidden by the law of that State; and if the people of this State desire to keep such cattle from entering this State, they can do so by putting up a fence along the line between this State and Missouri or by a statute authorizing the cattle of nonresidents which stray into this State to be impounded and kept at the costs of the owners. But to undertake to arrest and fine a resident of Missouri because he does not prevent his cattle from straying into this State would be to assume a jurisdiction over the residents of that State never intended by the statute and beyond the power of the Legislature to confer.

The evidence in the case was conflicting, and some of it, if true, might have warranted a finding that the defendant was guilty, but the finding of facts by the court has evidence to support it, and, taking that as true, no crime was committed.

The judgment will therefore be reversed, and the cause remanded for a new trial.

KING v. INTERSTATE CONSOLIDATED STREET RAILWAY CO.

SUPREME COURT OF RHODE ISLAND, 1902.

[*Reported* 23 *R. I.* 583.]

TILLINGHAST, J. These cases, which are substantially alike, are before us on demurrers to the declarations. We will consider the first-named case. It is trespass on the case for negligence, and sets out, in substance, in the first count thereof, that the plaintiff was employed by the defendant corporation to help remove snow from its

tracks between Pawtucket, R. I., and Attleboro, Mass., in very cold weather in the month of February, 1899; that the work had to be done over a wide tract of open country, remote from dwelling houses and other habitations; that the defendant knew that the work of removing said snow and ice from its tracks and roadbed in said open country, in view of the cold and stormy weather, was very trying, exhausting, and dangerous to the laborers engaged therein, and that it was the duty of the defendant corporation to furnish sufficient food and shelter to the plaintiff during the continuance of said work, and to provide for the safety of the plaintiff while so employed, and to carry him to his home in Pawtucket when returning from said work; that he was ignorant of the danger attending said work in the open country in cold and stormy weather, and that while engaged for 24 hours therein, and while in the exercise of due care, and in ignorance of the peril to which he was exposed, both of his feet were frozen, of which fact he informed the defendant's agents and servants, and requested them to carry him to his home, in Pawtucket, but that the defendant, its agents and servants, well knowing the premises, carelessly and negligently failed to provide food and shelter for the plaintiff; and that the freezing of his feet was due to the failure of the defendant corporation, its agents and servants, to supply him with food and shelter while so engaged. It is further alleged that, in consequence of the freezing of plaintiff's feet, they had to be amputated, whereby he was disabled, etc. The second count differs from the first in that it alleges that, without fault on his part, both of his feet were frozen, of which fact he informed the defendant, its agents and servants, and requested them to carry him to his home, in Pawtucket, which they carelessly and negligently refused to do, and, being unable to procure passage to his home, he was obliged to make his way there on his hands and knees, and was engaged in making said journey from 7 o'clock in the evening until 8 o'clock the next morning. And he avers that in consequence thereof, and without fault on his part, his feet were so badly frozen that they afterwards had to be amputated, and that it was the duty of the defendant, under the circumstances set forth, to provide him with food and shelter and transportation as aforesaid. To this declaration the defendant demurs on the grounds (1) that the defendant owed no legal duty to the plaintiff in the premises; (2) that the alleged negligence was not the proximate cause of the accident; (3) that the danger complained of was obvious to the plaintiff, and that he assumed it as one of the risks of his employment; (4) that the plaintiff was not in the exercise of due care; and (5) that it does not appear from the declaration that the defendant was guilty of negligence.[1] . . .

We think the second count is also demurrable. It is not alleged that the defendant corporation conveyed the plaintiff to his place of

[1] So much of the opinion as discusses the first count is omitted. — ED.

work, or that it promised, either expressly or impliedly, to carry him back to his home; and it is not, and could not successfully be, contended that it is any part of the duty of an employer to carry his employes to or from their place of work, in the absence, at any rate, of some custom, understanding, or agreement to that effect. In Ionnone *v.* Railroad Co., 21 R. I. 452, 44 Atl. 592, 46 L. R. A. 730, 79 Am. St. Rep. 812, Matteson, C. J., in delivering the opinion of the court, said: "The carrying of the deceased after his day's work was done to a point near his home is, we think, to be regarded not as creating the relation of a passenger, but, rather, as a privilege incidental to his contract of service, granted him by the defendant, of which he availed himself to facilitate his return to his home, and that it was a privilege accorded to him merely by reason of his contract of service." Schumaker *v.* Railroad Co., 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257, cited by plaintiff's counsel in support of this count, while at first blush it would seem to sustain the same, yet, upon more careful study, we think it is distinguishable from the case at bar. There the plaintiff was sent to repair a wrecked caboose on the line of the defendant's road. It was extremely cold, and a village nine miles away was the nearest point at which he could get food and shelter. He was not provided with food or sufficient clothing for exposure to such weather. The company knew this, and knew that he relied upon its sending for him in the evening. It did not do so, and he was obliged to walk back to the village, and by reason of his exposure to the extreme cold he contracted rheumatism and was permanently injured. The court held that he was entitled to recover. The case was different from the one now before us, in this: That it was evidently alleged in the declaration (although the declaration is not set out in the case) that the defendant knew of the plaintiff's unprepared condition as to clothing, etc., and also knew that he relied on the defendant's furnishing him with transportation when the work was completed. Whether, in case the declaration now before us showed such a state of facts, we should follow that case and sustain it, we are not now called upon to decide. That the defendant's conduct toward the plaintiff in refusing to carry him home after his feet were frozen was highly reprehensible, morally speaking, no one will question. Indeed, it is well-nigh inconceivable that the agents and servants of the defendant corporation could have been guilty of so gross an act of inhumanity. But courts of law can only take notice of legal rights, duties, and obligations, and must decide cases in accordance therewith, regardless of humanitarian questions. The demurrer to the second count is sustained.

As the declaration in the second-named case, namely, John Morrison *v.* Interstate Consolidated St. Ry. Co., is the same as the one we have already considered, the demurrer thereto is also sustained, and the cases are remanded to the common pleas division for further proceedings.

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PEOPLE v. BEARDSLEY.

SUPREME COURT OF MICHIGAN, 1907.

[*Reported* 150 *Mich.* 206.]

MCALVAY, C. J. Respondent was convicted of manslaughter before the circuit court for Oakland county, and was sentenced to the State prison at Jackson for a minimum term of one year and a maximum term not to exceed five years. He was a married man living at Pontiac, and at the time the facts herein narrated occurred, he was working as a bartender and clerk at the Columbia Hotel. He lived with his wife in Pontiac, occupying two rooms on the ground floor of a house. Other rooms were rented to tenants, as was also one living room in the basement. His wife being temporarily absent from the city, respondent arranged with a woman named Blanche Burns, who at the time was working at another hotel, to go to his apartments with him. He had been acquainted with her for some time. They knew each other's habits and character. They had drunk liquor together, and had on two occasions been in Detroit and spent the night together in houses of assignation. On the evening of Saturday, March 18, 1905, he met her at the place where she worked, and they went together to his place of residence. They at once began to drink and continued to drink steadily, and remained together, day and night, from that time until the afternoon of the Monday following, except when respondent went to his work on Sunday afternoon. There was liquor at these rooms, and when it was all used they were served with bottles of whiskey and beer by a young man who worked at the Columbia Hotel, and who also attended respondent's fires at the house. He was the only person who saw them in the house during the time they were there together. Respondent gave orders for liquor by telephone. On Monday afternoon, about one o'clock, the young man went to the house to see if anything was wanted. At this time he heard respondent say they must fix up the rooms, and the woman must not be found there by his wife, who was likely to return at any time. During this visit to the house the woman sent the young man to a drug store to purchase, with money she gave him, camphor and morphine tablets. He procured both articles. There were six grains of morphine in quarter-grain tablets. She concealed the morphine from respondent's notice, and was discovered putting something into her mouth by him and the young man as they were returning from the other room after taking a drink of beer. She in fact was taking morphine. Respondent struck the box from her hand. Some of the tablets fell on the floor, and of these, respondent crushed several with his foot. She picked

up and swallowed two of them, and the young man put two of them in the spittoon. Altogether it is probable she took from three to four grains of morphine. The young man went away soon after this. Respondent called him by telephone about an hour later, and after he came to the house requested him to take the woman into the room in the basement which was occupied by a Mr. Skoba. She was in a stupor and did not rouse when spoken to. Respondent was too intoxicated to be of any assistance and the young man proceeded to take her downstairs. While doing this Skoba arrived, and together they put her in his room on the bed. Respondent requested Skoba to look after her, and let her out the back way when she waked up. Between nine and ten o'clock in the evening Skoba became alarmed at her condition. He at once called the city marshal and a doctor. An examination by them disclosed that she was dead.

Many errors are assigned by respondent, who asks to have his conviction set aside. The principal assignments of error are based upon the charge of the court, and refusal to give certain requests to charge, and are upon the theory that under the undisputed evidence in the case, as claimed by the people and detailed by the people's witnesses, the respondent should have been acquitted and discharged. In the brief of the prosecutor his position is stated as follows:

"It is the theory of the prosecution that the facts and circumstances attending the death of Blanche Burns in the house of respondent were such as to lay upon him a duty to care for her, and the duty to take steps for her protection, the failure to take which, was sufficient to constitute such an omission as would render him legally responsible for her death. . . . There is no claim on the part of the people that the respondent . . . was in any way an active agent in bringing about the death of Blanche Burns, but simply that he owed her a duty which he failed to perform, and that in consequence of such failure on his part she came to her death."

Upon this theory a conviction was asked and secured.

The law recognizes that under some circumstances the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter. 21 Cyc. p. 770 *et seq.*, and cases cited. This rule of law is always based upon the proposition that the duty neglected must be a legal duty, and not a mere moral obligation. It must be a duty imposed by law or by contract, and the omission to perform the duty must be the immediate and direct cause of death. 1 Bishop on Criminal Law (6th Ed.), § 217; 2 Bishop on Criminal Law (6th Ed.), § 695; 21 Am. & Eng. Enc. Law (2d Ed.), p. 99; 21 Cyc. p. 770 *et seq.*; State *v.* Noakes, 70 Vt. 247; 2 Wharton on Criminal Law (7th Ed.), § 1011; Clark & Marshall on Crimes (2d Ed.), p. 379 (*e*), and cases cited.

Although the literature upon the subject is quite meagre and the cases few, nevertheless, the authorities are in harmony as to the relationship which must exist between the parties to create the duty, the omission of which establishes legal responsibility. One authority has briefly and correctly stated the rule, which the prosecution claims should be applied to the case at bar, as follows:

"If a person who sustains to another the legal relation of protector, as husband to wife, parent to child, master to seaman, etc., knowing such person to be in peril of life, willfully or negligently fails to make such reasonable and proper efforts to rescue him as he might have done without jeopardizing his own life or the lives of others, he is guilty of manslaughter at least, if by reason of his omission of duty the dependent person dies.

"So one who from domestic relationship, public duty, voluntary choice, or otherwise, has the custody and care of a human being, helpless either from imprisonment, infancy, sickness, age, imbecility, or other incapacity of mind or body, is bound to execute the charge with proper diligence and will be held guilty of manslaughter, if by culpable negligence he lets the helpless creature die." 21 Am. & Eng. Enc. Law (2d Ed.), p. 197, notes and cases cited.

The following brief digest of cases gives the result of our examination of American and English authorities, where the doctrine of criminal liability was involved when death resulted from an omission to perform a claimed duty. We discuss no cases where statutory provisions are involved.

In Territory *v.* Manton, 8 Mont. 95, a husband was convicted of manslaughter for leaving his intoxicated wife one winter's night lying in the snow, from which exposure she died. The conviction was sustained on the ground that a legal duty rested upon him to care for and protect his wife, and that his neglect to perform that duty, resulting in her death, he was properly convicted.

State *v.* Smith, 65 Me. 257, is a similar case. A husband neglected to provide clothing and shelter for his insane wife. He left her in a bare room without fire during severe winter weather. Her death resulted. The charge in the indictment is predicated upon a known legal duty of the husband to furnish his wife with suitable protection.

In State *v.* Behm, 72 Iowa, 533, the conviction of a mother of manslaughter for exposing her infant child without protection, was affirmed upon the same ground. See, also, Gibson *v.* Commonwealth, 106 Ky. 360.

State *v.* Noakes, *supra*, was a prosecution and conviction of a husband and wife for manslaughter. A child of a maid servant was born under their roof. They were charged with neglecting to furnish it with proper care. In addition to announcing the principle in support of which the case is already cited, the court said:

"To create a criminal liability for neglect by nonfeasance, the neglect must also be of a personal, legal duty, the natural and ordinary consequences of neglecting which would be dangerous to life."

In reversing the case for error in the charge — not necessary to here set forth — the court expressly stated that it did not concede that respondents were under a legal duty to care for this child because it was permitted to be born under their roof, and declined to pass upon that question.

In a Federal case tried in California before Mr. Justice Field of the United States Supreme Court, where the master of a vessel was charged with murder in omitting any effort to rescue a sailor who had fallen overboard, the learned Justice in charging the jury said:

"There may be in the omission to do a particular act under some circumstances, as well as in the commission of an act, such a degree of criminality as to render the offender liable to indictment for manslaughter. . . . In the first place the duty omitted must be a plain duty . . . In the second place it must be one which the party is bound to perform by law or contract, and not one the performance of which depends simply upon his humanity, or his sense of justice or propriety." United States *v.* Knowles, 4 Sawyer (U. S.), 517.

Seeking for a proper determination of the case at bar by the application of the legal principles involved, we must eliminate from the case all consideration of mere moral obligation, and discover whether respondent was under a legal duty towards Blanche Burns at the time of her death, knowing her to be in peril of her life, which required him to make all reasonable and proper effort to save her; the omission to perform which duty would make him responsible for her death. This is the important and determining question in this case. If we hold that such legal duty rested upon respondent it must arise by implication from the facts and circumstances already recited. The record in this case discloses that the deceased was a woman past 30 years of age. She had been twice married. She was accustomed to visiting saloons and to the use of intoxicants. She previously had made assignations with this man in Detroit at least twice. There is no evidence or claim from this record that any duress, fraud, or deceit had been practiced upon her. On the contrary it appears that she went upon this carouse with respondent voluntarily and so continued to remain with him. Her entire conduct indicates that she had ample experience in such affairs.

It is urged by the prosecutor that the respondent "stood towards this woman for the time being in the place of her natural guardian and protector, and as such owed her a clear legal duty which he completely failed to perform." The cases cited and digested establish that no such legal duty is created based upon a mere moral obligation. The fact that this woman was in his house created no such legal duty as exists

in law and is due from a husband towards his wife, as seems to be intimated by the prosecutor's brief. Such an inference would be very repugnant to our moral sense. Respondent had assumed either in fact or by implication no care or control over his companion. Had this been a case where two men under like circumstances had voluntarily gone on a debauch together and one had attempted suicide, no one would claim that this doctrine of legal duty could be invoked to hold the other criminally responsible for omitting to make effort to rescue his companion. How can the fact that in this case one of the parties was a woman, change the principle of law applicable to it? Deriving and applying the law in this case from the principle of decided cases, we do not find that such legal duty as is contended for existed in fact or by implication on the part of respondent towards the deceased, the omission of which involved criminal liability. We find no more apt words to apply to this case than those used by Mr. Justice Field in United States v. Knowles, *supra*.

"In the absence of such obligations, it is undoubtedly the moral duty of every person to extend to others assistance when in danger; . . . and if such efforts should be omitted by any one when they could be made without imperiling his own life, he would, by his conduct, draw upon himself the just censure and reproach of good men; but this is the only punishment to which he would be subjected by society."

Other questions discussed in the briefs need not be considered. The conviction is set aside, and respondent is ordered discharged.

MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

SECTION III.

Causation of Injury.

66 (2nd ed)

SOWLES v. MOORE.

SUPREME COURT OF VERMONT, 1893.

[*Reported* 65 *Vt.* 322.]

TYLER, J. This was an action of trespass on the case brought to recover the value of a pair of horses, which were drowned in Lake Champlain, through the alleged negligence of the defendants in not properly guarding an opening in the lake where they had been taking ice near a line of public travel.

The plaintiff's evidence tended to show that his son had occasion to drive onto the lake on the day of the accident; that the wind was blowing and the ice was glare; that in turning the team around the sled slewed and brought the pole against the horses' legs, frightening

them; that they escaped from the driver and ran rapidly from forty to sixty rods and into the opening, which was twenty to thirty feet long by forty to sixty feet wide, and but little guarded.

The statute, R. L. s. 4, 321, does not prescribe the manner in which such openings shall be guarded. It imposes a fine upon persons who, in localities where people are accustomed to travel, make openings and do not place suitable guards around them.

The jury found by special verdicts that the opening was not properly guarded, and that the plaintiff's servant was in the exercise of due care in respect to the team and the management of it.

The errors assigned were in the court's submitting to the jury to find whether the horses would not have run into the opening if it had been properly guarded, whether the guards would have stopped them, considering their fright and the speed with which they were running, and in the instructions that the plaintiff must make out that the horses were drowned by reason of the failure of the defendants to properly guard the opening; that if the guards would not have prevented the casualty the plaintiff could not recover, although he was in the exercise of due care and the defendants were negligent; that if the jury were satisfied by a fair balance of evidence that the horses would have been turned away by a suitable guard, then the defendants' negligence caused the damage.

These instructions did not contain a new proposition of law. It is a general rule that negligence must not only be alleged and proved, but it must also be shown that it caused the injury complained of. When injury on the part of the plaintiff and negligence on the part of the defendant concur, the plaintiff cannot, nevertheless, recover, if the defendant could not, by the exercise of due care, have prevented the accident from occurring. Red. & Shear. on Neg. s. 8. In cases that arose under our former statute rendering towns liable for injuries caused by defective highways, it was not sufficient to prove the existence of defects. It must also have been shown that the defects caused the injuries alleged. Lester *v.* Pittsford, 7 Vt. 158.

Were the horses in such fright and running at such speed that they would have been turned from their course by such guards as reasonably prudent men would have erected? This was a material question of fact for the jury to decide before they could say whether or not the defendants' negligence in respect to a guard was the cause of the casualty. Both questions were involved in the instruction that the plaintiff must make out "that the horses were drowned by reason of the failure of the defendants to properly guard the hole."

Suppose damages were claimed of a town, caused by an alleged defective railing upon a bridge; could the question be excluded from the consideration of a jury, upon proper evidence, whether from the nature of the accident a suitable railing could have prevented it? We think not.

In Titcomb *v.* Fitchburg R. R. Co., 12 Allen 254, the negligence alleged was the want of railings to the approaches to a highway bridge which the defendant was bound to maintain over its railroad at a crossing. Among other things the court instructed the jury that if they were satisfied that the injury to the plaintiff would not have occurred if the fence or railing had been sufficient, they must find a verdict for her. In considering this subject the Supreme Court said: "So far as such a fence would be effectual to guard against injury from the frightening of a horse about to enter upon the bridge, by the approach of a train of cars passing under the bridge, the plaintiff was entitled to that protection. Not that the defendant was bound to maintain a barrier that would in all cases stop the progress of a frightened horse about to enter upon the bridge, but it was bound to maintain and keep in repair a suitable and proper fence at the place; and if the discharge of this duty would have prevented the occurrence of the present injury, and the plaintiff is shown to have been without fault on her part, the railroad company may properly be charged in the present action. The fact whether such a fence would have prevented the occurrence of the injury may be a difficult one for the jury to find, but the burden is on the plaintiff to show this, and if she can establish it the defendant may be held liable for the injuries sustained. The case of a horse being frightened is one of the cases of casualty which may and often does occur, and is entirely consistent with a reasonable degree of care and prudence on the part of the traveler. Such traveler has a right in case of such occurrence to the protection which such a fence as the law requires the railroad company to maintain would have given. If such a fence would have been unavailing, and the injury would still have occurred, the traveler cannot say his injury was occasioned by any neglect of the railroad company, and he must bear the loss; but if otherwise, the liability attaches to the party bound to maintain the fence as an appendage to the bridge."

In Wilson *v.* Atlanta, 60 Ga. 473, it was alleged that an injury was caused by the defendant's negligence in not providing a railing upon a street. An instruction was held proper, that the questions, whether or not there was negligence in not putting up the railing, and whether such negligence caused the injury to the plaintiff, might be tested by the inquiry whether the plaintiff would not have been injured even if the railing had been constructed.

In Ilfrey *v.* Sabine, etc., R. R. Co., 76 Tex. 63, the plaintiff sought to charge the defendant with liability by reason of its maintaining an embankment, which, as alleged, caused the destruction of the plaintiff's house by water. It was held competent for the trial court to consider evidence tending to show that the house would have been swept away by the storm, regardless of the embankment, to find that fact from a preponderance of the evidence, and that the embankment was not the proximate cause of the destruction.

In Bellefontaine, etc., R. R. Co. v. Bailey, 11 Ohio St. 333, it was alleged that the defendant negligently ran its train so as to kill the plaintiff's horses. It was held error for the court to refuse an instruction to the jury, that though the defendant was negligent, the plaintiff must fail in his action if the jury believed from the evidence that due care, had it been used, would not have prevented the injury.

A corresponding proposition was contained in Judge Steele's charge in Walker and wife v. Westfield, 39 Vt. 246, which was construed by this court to mean that though the plaintiffs were not in the exercise of due care, if "such want of care did not contribute to the accident, then it is of no consequence in the case, and will not prevent a recovery."

We find the instructions fully sustained both by reason and authority.

The request to charge in respect to "the known instincts of the horse" did not embody any legal proposition. All that the court could properly say on this subject was said in reply to an inquiry by the jury.

Judgment affirmed.[1]

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GRAVES v. JOHNSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1901.

[*Reported* 179 *Mass.* 53.]

HOLMES, C. J. This is the second time that this case comes before this court. 156 Mass. 211. It is a suit for the price of intoxicating liquors sold here. At the first trial it was found that they were sold with a view to their being resold by the defendant in Maine against the laws of that State; and on that state of facts it was held that the action would not lie. At the second trial it was found that the plaintiffs' agent supposed, rightly, that the defendant intended to resell the liquors in Maine unlawfully, but that the plaintiffs and their agent were and were known by the defendant to be indifferent to what he did with the goods, and to have no other motive or purpose than to sell them in Massachusetts in the usual course of business. Seemingly the plaintiffs did not act in aid of the defendant's intent beyond selling him the goods. The judge refused to rule that the plaintiffs' knowledge of the defendant's intent would prevent their recovery, and the case is here again on exceptions.

The principles involved are stated and some of the cases are collected in the former decision. All that it is necessary for us to say now is that in our opinion a sale otherwise lawful is not connected with subsequent unlawful conduct by the mere fact that the seller correctly divines the buyer's unlawful intent, closely enough to make the sale unlawful. It will be observed that the finding puts the plaintiffs'

[1] *Acc.* Brash v. St. Louis, 161 Mo. 433; Laidlaw v. Sage, 158 N. Y. 73; Helbling v. Cemetery Co., 201 Pa. 171.

knowledge of the defendant's intent no higher than an uncommunicated inference as to what the defendant was likely to do. Of course the defendant was free to change his mind, and there was no communicated desire of the plaintiffs to coöperate with the defendant's present intent, such as was supposed in the former decision, but on the contrary an understood indifference to everything beyond an ordinary sale in Massachusetts. It may be that, as in the case of attempts, (Commonwealth *v.* Peaslee, 177 Mass. 267; Commonwealth *v.* Kennedy, 170 Mass. 18, 22,) the line of proximity will vary somewhat according to the gravity of the evil apprehended, Steele *v.* Curle, 4 Dana, 381, 385-388; Hanauer *v.* Doane, 12 Wall. 342, 346; Bickel *v.* Sheets, 24 Ind. 1, 4, and in different courts with regard to the same or similar matters. Compare Hubbard *v.* Moore, 24 La. An. 591; Michael *v.* Bacon, 49 Mo. 474, with Pearce *v.* Brooks, L. R. 1 Ex. 213. But the decisions tend more and more to agree that the connection with the unlawful act in cases like the present is too remote. M'Intyre *v.* Parks, 3 Met. 207; Sortwell *v.* Hughes, 1 Curt. C. C. 244, 247; Green *v.* Collins, 3 Cliff. 494; Hill *v.* Spear, 50 N. H. 253; Tracy *v.* Talmage, 4 Kernan, 162; Distilling Co. *v.* Nutt, 34 Kans. 724, 729; Webber *v.* Donnelly, 33 Mich. 469; Tuttle *v.* Holland, 43 Vt. 542; Braunn *v.* Keally, 146 Penn. St. 519, 524; Wallace *v.* Lark. 12 So. Car. 576, 578; Rose *v.* Mitchell, 6 Col. 102; Jameson *v.* Gregory, 4 Met. (Ky. 363, 370; Bickel *v.* Sheets, Hubbard *v.* Moore, and Michael *v.* Bacon), *ubi supra.*

Although a different rule was assumed in Suit *v.* Woodhall, 113 Mass. 391, it will be seen that it equally was assumed by the instructions given at the trial, and that the exceptions and the point decided in that case concerned only the imputation to the plaintiffs of their agent's knowledge. M'Intyre *v.* Parks never has been overruled. Dater *v.* Earl, 3 Gray, 482; Webster *v.* Munger, 8 Gray, 584, 587; Adams *v.* Coulliard, 102 Mass. 167, 172; Milliken *v.* Pratt, 125 Mass. 374, 376.

Exceptions to the admission of letters of the plaintiffs' agent to them for the purpose of showing what they knew are not argued.

Exceptions overruled.

REGINA *v.* FRETWELL.

CROWN CASE RESERVED. 1862.

[*Reported Leigh & Cave*, 161.]

ERLE, C. J. The prisoner in this case was convicted of murder; and the question for us is whether, upon the facts stated, he was properly convicted. The deceased, Elizabeth Bradley, was pregnant, and, for

the purpose of producing abortion, took a dose of corrosive sublimate, which had been procured for her by the prisoner with a full knowledge of the purpose to which it was to be applied. In procuring the poison the prisoner had acted at the instigation of the deceased, and under the influence of threats by her of self-destruction if the means of procuring abortion were not supplied to her. Then the case sets out the reasons which caused the woman to be so desirous of preventing her state becoming known. The jury expressly negatived the fact of the prisoner having administered the poison to the deceased, or caused it to be taken by her; but they found that he had delivered it to her with a knowledge of the purpose to which she intended to apply it, and that he was therefore accessory before the fact to her taking poison for the purpose of procuring abortion. Chief Justice COCKBURN thereupon, on the authority of Russell's Case, directed the jury to return a verdict of wilful murder against the prisoner, and reserved the case for the consideration of this Court. Now, upon the facts stated, the present case appears to me to differ materially from that of Rex *v.* Russell. There the prisoner, finding the woman to be pregnant, of his own motion procured arsenic, gave it to the woman, and instigated and persuaded her to take it, for the purpose of procuring a miscarriage; and the woman took it knowingly, with the like intent of procuring a miscarriage, and thereby caused her own death. The Judges held that it was a misdemeanor in her to take arsenic for the purpose of procuring abortion; that, having thereby caused her own death, she was *felo de se;* and that the prisoner was an accessory before the fact to the murder. Now, there appears to me to be a very marked distinction between the conduct of the prisoner, Fretwell, in this case, and the conduct of the prisoner, Russell, in the case I have already referred to. In the latter case, Russell instigated and persuaded the woman to take the arsenic. In the present case, the prisoner was unwilling that the woman should take the poison. He procured it for her at her instigation, and under a threat by her of self-destruction. He did not administer it to her, or cause her to take it, and the facts of the case are quite consistent with the supposition that he hoped and expected that she would change her mind and would not resort to it. Then, the cases being distinguishable, it is unnecessary to decide whether in this case the woman was *felo de se.* I am the more fortified in my opinion by looking at the late statute for consolidating and amending the law relating to offences against the person. By sect. 58 of that statute, any woman administering poison to herself with intent to procure miscarriage, and any person administering it to her or causing it to be taken by her with the like intent, is guilty of felony. By sect. 59, any one supplying or procuring any poison, knowing that the same is intended to be used with intent to procure miscarriage, is guilty of a misdemeanor. The crime, therefore, of procuring or supplying the poison is one of a totally different character from that of administering it, or causing it to be taken. My opinion is, that the prisoner was not guilty of murder, and that the conviction must be quashed.

MARTIN, B. I am of the same opinion. The acts of the prisoner were too remote from the death of the woman to make him guilty of murder.

CHANNELL, B. I am of the same opinion with the Lord Chief Justice, and for the reasons which he has given.

BLACKBURN, J. I am of the same opinion. According to the finding of the jury, the prisoner neither administered the poison nor caused it to be taken by the woman, and therefore was not a party to what took place in such a way as to make what he did amount to murder.

KEATING, J. I am of the same opinion. *Conviction quashed.*

not in Ireland

LIVINGSTON v. COMMONWEALTH.

COURT OF APPEALS OF VIRGINIA. 1857.

[*Reported* 14 *Grattan* 592.]

AT the October term 1856 of the Circuit court of the city of Richmond, George Livingston was indicted for the murder of Elizabeth Duesberry. The indictment was in the usual form of a common law indictment for murder, and contained but one count. To this indictment the prisoner demurred; but his demurrer was overruled. He was tried at the same term, and found guilty of murder in the second degree; but on the motion of the prisoner, the court set aside the verdict and granted him a new trial. In April 1857 the prisoner was again tried and found guilty of voluntary manslaughter; and the term of his imprisonment was fixed at one year. Upon this trial the clerk charged the jury in the same terms as on the first trial. Upon the verdict the court rendered judgment against the prisoner; and he applied to this court for a writ of error; which was allowed.

On the trial a number of questions were saved; but it is only necessary to state those which were acted on by this court. It appears that the deceased was the mistress of the prisoner, and that he frequently beat her. On the Saturday previous to her death he gave her a beating, which was testified to by two of the inmates of the house where she lived. These witnesses testified that on the same evening, and about two hours after the beating, she complained of a violent pain in her side. This testimony the prisoner moved the court to exclude; but the court overruled the motion; and the prisoner excepted. This is his first exception.

Dr. Waring, a practising physician in Richmond, was sent for to see the deceased, and attended her until her death on the next Thursday. He stated, in giving in his evidence, that he heard nothing, either from the deceased or the witnesses, of bruises or pain anywhere except in the lower part of the abdomen, in the region of the bladder. That he treated the deceased to allay inflammation and promote action on the bowels. He made a post-mortem examination; and after detailing

the appearances, said he saw sufficient cause of death, without referring it to the beating. The witness having said, in answer to a question by the attorney for the commonwealth, that he heard the testimony of all the witnesses who had been examined, the attorney put to him the following question: Do you not think that the violence which she received by the beating which you have heard described accelerated the death of the deceased? This question was objected to by the counsel for the prisoner; but the objection was overruled, and he excepted. This is his second exception.[1]

DANIEL, J. It seems to me, however, that the court below erred in receiving a portion of the testimony set out in the fifth bill of exceptions; and more particularly that portion sought and elicited by the ninth question propounded by the prosecution to the witness Waring. I know of no authority which would hold a party criminally responsible in a case such as that which it was the aim and tendency of this testimony to establish.

It is true that if a man be sick of a mortal disease, and receives a wound which, by irritating or provoking the disease to operate more violently, hastens his death, the party inflicting the wound may be held accountable for the death. In such a case, it is said, the deceased has not died *ex visitatione dei*, for the wound has hastened the death, and the offender cannot apportion his wrong. 1 Hale, 428.

So again, it is said by the same authority, if a man receives a wound not mortal, and through neglect or failure to use the proper application, it turns to a gangrene or fever which causes the death, then the wound, being the cause of the gangrene or fever, is regarded as the *causa causati*, and the party inflicting the wound may be held responsible for the death.

On the other hand, however, if the wound be not mortal, but with ill applications the party dies, and it clearly appears that the medicine and not the wound was the cause of death, this is not homicide.

It will be seen that there is a marked difference between the first two cases thus instanced by Lord Hale, and the case pointed to by the testimony in question. In neither of the former is any independent cause interposed between the wound and the death. In the first of the two the death would not have occurred at the time it did but for the wound. Though the sick man was laboring under a disease, which if left to take its natural course, would result in death at no distant period, yet the death in respect of time is plainly referable to the wound. So, in the second, though the gangrene is the proximate cause of the death, yet the gangrene is a consequence of the wound; and so the death is, by a regular course and natural order, in the sequence of events, traced up to the wound as its originating cause. But in the case sought to be made out by the testimony objected to, a disease is

[1] Only so much of the case as relates to this exception is given.— ED.

supposed to have supervened between a blow not mortal and the death: a disease not caused by the blow, but coming by the visitation of Providence.

In such a case, the exemption of the party inflicting the blow from criminal accountability, is, it seems to me, even more obvious than in the third of the instances cited from Hale. For then it might be said the "ill application" of which the party died would not have been resorted to but for the wound inflicted by the wrong-doer; and if the connection there, between the wound and the death, is too remote to be made the foundation of criminal responsibility, *a fortiori*, must such be the rule when the disease, but for the supervention of which the death would not have occurred, is, in its origin, independent of the wound or blow, and wholly out of the course of its consequences. In such a state of things, the blow and the death have no necessary or natural connection with each other as cause and effect. The blow is neither the proximate cause of the death, nor is it, though made by extraneous circumstances to accelerate it, linked with it in the regular chain of causes and consequences. A new and wholly independent instrumentality is interposed in the shape of the disease; and in contemplation of law, the death stroke is inflicted by the hand of Providence, and not by the hand of violence.

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STATE v. SCATES.

SUPREME COURT OF NORTH CAROLINA. 1858.

[*Reported* 5 *Jones* 420.]

DR. HILL saw the deceased [child] about twenty hours after it was burnt. He dissected the burnt parts, and found the injuries very extensive, the arms, back, and thighs were roasted, — crisped like a piece of leather. He stated that there was a wound in the forehead, as if from a blow; he was fully satisfied the burning in itself was fatal, and must have produced death, but he "doubted as to the immediate cause of death — thought it was produced by the blow." He explained on cross-examination that he thought the burning the primary cause of the death, but that it was probably hastened by the wound on the head.[1]

The Court charged the jury that . . . as to the cause of the death, it was for them to say whether it had been produced by the burning, or other means, and that if produced by the burning, they should be satisfied that the burning was the act of the prisoner; "and even should they share in the doubt expressed by the doctor, that the blow had caused its immediate death, yet if satisfied that the burning was the primary cause of the death, and the blow only hastened it, it would be their duty to convict." — Defendant again excepted.

Verdict "guilty." Judgment and appeal by the defendant.

[1] Part of the case, turning on the admissibility of a confession, is omitted. — ED.

BATTLE, J. . . . Upon the other point in the case, we are decidedly of opinion that the prisoner is entitled to a new trial. As to the cause of the death of the deceased, his Honor charged the jury that if they "should share in the doubt expressed by the doctor, that the blow had caused the immediate death, yet, if satisfied that the burning was the primary cause of the death, and the blow only hastened it, it would be their duty to convict." This instruction was given upon the supposition that the blow was inflicted by another person, and the proposition could be true only when the testimony connected the acts of such person with the prisoner, so as to make them both guilty, and we at first thought such was the proper construction to be put upon the language used by his Honor; but, upon reflection, we are satisfied that a broader proposition was laid down, to wit: that if the prisoner inflicted a mortal wound, of which the deceased must surely die, and then another person, having no connection with him, struck the child a blow, which merely hastened its death, the prisoner would still be guilty. The testimony presented a view of the case to which this proposition was applicable, and it becomes our duty to decide whether it can be sustained upon any recognized principles of law.

Murder is the killing, with malice prepense, a reasonable being within the peace of the State. The act of killing, and the guilty intent, must concur to constitute the offence. An attempt, only, to kill with the most diabolical intent, may be moral, but cannot be legal, murder. If one man inflicts a mortal wound, of which the victim is languishing, and then a second kills the deceased by an independent act, we cannot imagine how the first can be said to have killed him, without involving the absurdity of saying that the deceased was killed twice. In such a case, the two persons could not be indicted as joint murderers, because there was no understanding or connection between them. It is certain that the second person could be convicted of murder, if he killed with malice aforethought; and to convict the first would be assuming that he had also killed the same person at another time. Such a proposition cannot be sustained.

The prisoner must have a new trial. This renders it unnecessary for us to consider the effect of the alleged erroneous entry of the verdict.

PER CURIAM. *Judgment reversed.*

PEOPLE v. AH FAT.

SUPREME COURT OF CALIFORNIA. 1874.

[*Reported* 48 *Cal.* 61.]

THE defendant was indicted jointly with Ah Wee and Ah Moy for the murder of Ah Quong. There was testimony tending to show that the deceased was injured not only by a pistol shot, but also by a blow given by a hatchet. The defendant asked the court to instruct the jury that if they believed "that before Ah Quong the deceased, was cut with a hatchet, he had been mortally wounded by a pistol shot not fired by the defendant," then they should find him not guilty. The defendant also asked the Court to instruct that "if the jury have a reasonable doubt as to the cause of the death of the deceased, the defendant is entitled to the benefit of such doubt, and they will acquit the defendant if his death was caused by a pistol shot, not administered by defendant, nor by any one to whose act he was only an accessory." These were instructions thirteen and fourteen, and were refused by the Court.[1]

The defendant was convicted of murder in the second degree and sentenced to imprisonment for life, and appealed.

NILES, J. . . . The thirteenth instruction asked by the counsel for the defendant was properly refused. The jury would have been informed substantially that a defendant is not guilty of murder in the killing of a person who has already been mortally wounded by another — a doctrine which cannot be seriously contended for. Moreover, both this instruction and the fourteenth, asked by the defendant, were radically defective, because they ignored the possible guilt of the defendant as a present aider and abetter of the killing.[2]

[1] Only so much of the case as relates to these exceptions is given. — ED.

[2] "If the defendant fired the first shot in necessary self-defence, and then afterwards, when Kernoodle had abandoned the contest, and was fleeing, he again fired upon him, inflicting another wound, when the circumstances were not such as to make a reasonable man in his situation believe that he was then in immediate danger of great bodily injury, he would be guilty either of some degree of homicide, or of an unlawful assault, depending upon the question whether or not the wound inflicted by the last shot either caused, contributed to, or accelerated his death. In other words, if the last shot was not fired in necessary self-defence, and the wound inflicted by it either caused his death, or contributed to or hastened it, the defendant would be guilty of some degree of homicide, even though the first shot was fired in self-defence, and though, at the time the last shot was fired, the deceased was already so severely wounded that his death would have followed in a very short time. On the other hand, if the first shot was fired in self-defence, and the last shot neither caused his death, nor contributed to, or hastened it, then he could not properly be convicted of any degree of homicide, but might be convicted of an assault." RIDDICK, J., in Rogers v. State, 60 Ark. 76. — ED.

REGINA *v.* MORBY.

COURT FOR CROWN CASES RESERVED. 1882.

[*Reported* 15 *Cox, C. C.* 35.]

CASE reserved for the opinion of this court by Sir H. Hawkins.

The prisoner was convicted before me at the last session of the Central Criminal Court, of the manslaughter of his son, Abraham Morby, a child under the age of fourteen, who lived with him, and was in his custody at Woolwich.

The prisoner had ample means and opportunity to provide adequate food, clothing, medical aid, and lodging for his child, and he did provide all these things, except medical aid; this he, under the circumstances hereinafter stated, wilfully neglected and omitted to provide, because, being one of the "Peculiar People," he did not believe in medical aid, but trusted in prayer and anointment alone (see Epistle of St. James, c. 5, v. 14).

The deceased child, who was eight years old, was, on the 27th Dec. last, known by the prisoner to be suffering from confluent small-pox. Of that disease it died on the 8th Jan.

The jury found that it was reasonable and proper that the prisoner should have called in and provided medical aid for it, but that he wilfully neglected and omitted so to do.

No medical man saw the deceased during life; but Dr. Sharpe, who made a *post mortem* examination of the body, stated that death was undoubtedly due to small-pox; that small-pox is a disease requiring medical advice and skill, great attention, and great care, and if not attended to, is calculated to spread.

This question was put to Dr. Sharpe: "In your opinion, do you think the life of the deceased might have been probably prolonged if medical skill had been called in?" to which he answered thus: "Probably; but I would rather put it in this way: that the chances of the boy's life would have been increased by having medical advice."

The prisoner's counsel admitted that he could not contend that the prisoner was not guilty of a breach of the statutory duty imposed on him by 31 & 32 Vict. c. 122, s. 37, but he submitted that the death was not caused by that breach of duty. I held that, if death was accelerated thereby, it would be sufficient. Upon this the prisoner's counsel urged that there was no proof that death was so accelerated. Thereupon Dr. Sharpe was recalled, and the following questions were put to him, to which he gave the answers subjoined:

Q. — In your judgment, if medical advice and assistance had been called in at any stage of this disease, might the death have been averted altogether?

A. — I can only answer that by saying that it *might* have been. Ours is not a positive science. It might have been averted if medical

aid had been called in at any earlier stage. I am unable to say whether it probably would. I might say probably as to whether life might have been prolonged. I cannot say that death would probably have been averted. I think it probable that life might have been prolonged. I can only say *probably might*, because I did not see the case while living. I am unable to say that life *would* probably have been prolonged, because I did not see the case during life. Had I done so, I might have been able to answer the question.

The prisoner's counsel still insisted there was no proof that death was caused or accelerated by the prisoner's breach of duty.

I thought it best to submit the evidence to the jury, and to reserve the point if necessary.

I accordingly asked the jury whether the life of the child would, in their judgment, have been prolonged if medical aid had been called in when the prisoner became aware of the fact that deceased was suffering from small-pox?

To this question they answered that it would.

I then told them that if they so found, and that the death of the child, though it could not be certainly averted altogether, was nevertheless accelerated by the wilful neglect of the prisoner to provide such medical aid when it was reasonable and proper and his duty to provide it — he having the means and opportunity to do so — he was guilty of manslaughter.

On this direction the jury found him guilty.

I reserve for the opinion of the Court of Criminal Appeal these two questions:

1st. Whether there was any evidence that the life of the child would have been prolonged for any period of time, however short, if the prisoner had called in and provided medical aid — or in other words, that death was accelerated by his breach of duty?

If there was, I am satisfied with the finding of the jury.

2nd. Whether, assuming the prisoner to have accelerated the death of the child by his breach of duty in wilfully neglecting to provide for it medical aid as aforesaid, he was properly convicted of manslaughter?

If either of these questions is answered in the negative the conviction is to be quashed.

If both are answered in the affirmative it is to be affirmed.

The case not being one demanding punishment, I have released the prisoner on his own recognisanzes to appear for judgment if he should be required to do so.

See 31 & 32 Vict. c. 122, s. 37; Reg. *v.* Downes, L. Rep. 12 Q. B. Div. 25, s. c. 45 L. J.; 13 Cox's C. C. 111.

March 20, 1882. H. HAWKINS.

D. Kingsford for the prisoner. — There was no evidence in support of the charge of manslaughter which the judge ought to have left to the jury, and he ought to have directed an acquittal. It was necessary for the prosecution to show that the non-supply of medical assistance

by the prisoner was the direct and proximate cause of the death of the boy or of the acceleration of his death. The case of Rex v. Stockdale (2 Lewin C. C. 220) was then cited.

Poland (*Mead* with him) for the prosecution.

Lord COLERIDGE, C. J. —We are all clearly of opinion that the conviction cannot be supported. The jury may have thought that, as there had been a neglect of his duty by the parent, it was right to mark their sense of it by their verdict. Nothing could be more cautious than the answers given by the medical witness to the questions put to him. It was not enough to sustain the charge of manslaughter to show that the parent had neglected to use all reasonable means of saving the life of his child; it was necessary to show that what the parent neglected to do had the effect of shortening the child's life. The utmost that the doctor would say, giving his evidence under a strong responsibility, in answer to the question, "In your judgment, if medical advice and assistance had been called in at any stage of this disease, might the death have been averted altogether?" was, "I cannot say that death would probably have been averted. I think it probable that life might have been prolonged. I can only say probably might, because I did not see the case during life; had I done so I might have been able to answer the question." That evidence is far too vague to allow this conviction to stand when all that the skilled witness could say was that probably the life of the boy might have been prolonged if medical assistance had been called in.

GROVE, J. — I am of the same opinion. The jury, by their verdict, say what the medical witness expressly declined to say, that is, that the boy's life would have been prolonged by calling in medical assistance. The prosecution was bound to give affirmative evidence that the death was caused by the neglect of the prisoner to call in medical assistance.

STEPHEN, J. — I am of the same opinion. This matter might be made absolutely plain if the evidence were to go a little more into detail. Suppose the medical witness had been asked whether the administration of such-and-such medicines which had not been administered would have been of service in prolonging the boy's life, and he had answered that "probably they might have been, but that he could not undertake to say so, not having seen the case." Would any one say that the neglect to administer such medicines would make the father guilty of manslaughter? It is probable that the prisoner was guilty of an offence under the statute in not providing medical assistance, but it does not follow that he was guilty of manslaughter, which requires it to be shown that the result of the neglect was to cause death, whereas here it was left in doubt; and I have always understood that to warrant a conviction the minds of the jury must be free from any reasonable doubt.

MATTHEW and CAVE, JJ., concurred.

Conviction quashed.

72 ff 2nd

CASTELL, WIDOW, *v.* BAMBRIDGE AND CORBET.

GUILDHALL. 1730.

[*Reported* 2 *Strange*, 854.]

THE defendant Bambridge, having been prosecuted on the report of the committee of the House of Commons for the murder of the plaintiff's husband, who was a prisoner in the Fleet under the custody of Bambridge the warden, and having on the trial been honorably acquitted upon the prosecutor's own evidence, was followed with an appeal, to which Corbet, who on the cross-examination appeared to be a material witness for Bambridge, was now also made an appellee.[1]

Upon this the appeal was arraigned, setting forth that the appellant's husband was a prisoner in the Fleet under the custody of Bambridge the warden, who made an assault upon him, and contrary to his will carried him to the house of Corbet, a victualling house within the Fleet, and there imprisoned him, where one White then lay ill of the small-pox, which Castell had never had; that the appellees had notice of this, and were desired to suffer him to remove to another place in the prison, which they refused, and afterwards Castell fell ill of that distemper, and died in Corbet's house, whereby, the count concludes, the appellees were guilty of his murder.

Without staying for a copy of the declaration the appellees instanter pleaded not guilty, and their plea was rehearsed in French, and issue joined.

Upon the 26th of January the trial came on at Guildhall before the Chief Justice [RAYMOND]. After a long examination the Chief Justice directed the jury that if they believed Castell was carried to Corbet's against his consent, and was there so detained, that Bambridge and Corbet knew the small-pox was there, that Castell had not had it, but feared it, and desired to be removed, or not be carried there at all, that he caught the small-pox of White, and died thereof, — then the appellees would be guilty of murder; but if any one of these facts were not proved to the satisfaction of the jury, they ought to be acquitted. And there being no pretence to charge either of the appellees, the jury brought them in not guilty.[2]

[1] Part of the case, involving questions of procedure only, is omitted.

[2] See Rex *v.* Huggins, 2 Ld. Raym. 1574, 2 Strange, 862. In this case Lord Chief Justice Raymond said: "There is no particular way of killing another that is necessary to constitute a murder; but the committing of murder is as various as the several ways of putting an end to life. In the case of a prisoner there is no occasion for an actual stroke: the restraining him by force, and killing him by ill-usage, is enough to constitute this offence. All the authors who speak of this species of murder describe it by a general expression *per dure garde de ses gardens*." — ED.

REGINA v. GREENWOOD.

LIVERPOOL ASSIZES. 1857.

[*Reported* 7 *Cox C. C.* 404.]

THE prisoner was indicted for murder and rape on a child under ten.

It appeared from the evidence that the prisoner had connection with the deceased, and that it was afterwards discovered she had the venereal disease.

Fernley and *C. H. Hopwood*, for the prosecution.

Cobbett, for the prisoner.

WIGHTMAN, J., told the jury that the malice which constitutes murder might be either express or implied. There was no pretence in this case that there was any malice other than what might be implied by law. There were five questions for them to consider.

First, had the prisoner connection with her?

Secondly, did she die therefrom?

Thirdly, had she the venereal disease?

Fourthly, did she die from its effects?

Fifthly, did she get it from the prisoner?

If they were of opinion that the prisoner had connection with her, and she died from its effects, then that act being, under the circumstances of this case, a felony in point of law, this would, of itself, be such malice as would justify them in finding him guilty of murder.

The jury retired, and, after some time, returned into court saying that they were satisfied that he had connection, and that her death resulted therefrom, but were not agreed as to finding him guilty of murder.

WIGHTMAN, J., told them that, under these circumstances, it was open to them to find the prisoner guilty of manslaughter, and that they might ignore the doctrine of constructive malice if they thought fit.

The jury found a verdict of manslaughter, and the prisoner was ordered to be kept in penal servitude for life.

REGINA v. TOWERS.

CARLISLE ASSIZES. 1874.

[*Reported* 12 *Cox C. C.* 530.]

WILSON TOWERS was charged with the manslaughter of John Hetherington at Castlesowerby on the 6th of September, 1873.

The prisoner, who had been drinking on the 4th of August, went into a public-house at New Yeat near Castlesowerby, kept by the mother of the deceased, and there saw a girl called Fanny Glaister nursing the deceased child, who was then only about four months

and a half old, having been born on the 20th of March, 1873. The prisoner, who appeared to have had some grievance against Fanny Glaister about her hitting one of his children, immediately on entering the public-house went straight up to where she was, took her by the hair of the head, and hit her. She screamed loudly, and this so frightened the infant that it became black in the face; and ever since that day up to its death it had convulsions and was ailing generally from a shock to the nervous system. The child was previously a very healthy one.[1]

Henry submitted that there was no case to go to the jury, but DENMAN, J., said, that he should leave it to the jury to say whether the death of the child was caused by the unlawful act of the prisoner, or whether it was not so indirect as to be, in the nature of accident. This case was different from other cases of manslaughter, for here the child was not a rational agent, and it was so connected with the girl that an injury to the girl became almost in itself an injury to the child.

DENMAN, J., in summing up, said it was a very unusual case, and it was very unusual indeed to find a case in which they got practically no assistance from previously decided cases. There was no offence known to our law so various in its circumstances and so various in the considerations applicable to it as that of manslaughter. It might be that in this case, unusual as it was, on the principle of common law manslaughter had been committed by the prisoner. The prisoner committed an assault on the girl, which is an unlawful act, and if that act, in their judgment, caused the death of the child, *i. e.*, that the child would not have died but for that assault, they might find the prisoner guilty of manslaughter. He called their attention to some considerations that bore some analogy to this case. This was one of the new cases to which they had to apply old principles of law. It was a great advantage that it was to be settled by a jury and not by a judge. If he were to say, as a conclusion of law, that murder could not have been caused by such an act as this, he might have been laying down a dangerous precedent for the future; for to commit a murder a man might do the very same thing this man had done. They could not commit murder upon a grown-up person by using language so strong or so violent as to cause that person to die. Therefore mere intimidation, causing a person to die from fright by working upon his fancy, was not murder. But there were cases in which intimidations had been held to be murder. If for instance four or five persons were to stand round a man and so threaten him and frighten him as to make him believe that his life was in danger, and he were to back away from them and tumble over a precipice to avoid them, then murder would have been committed. Then did or did not this principle of law apply to the case of a child of such tender years as the child in question?

[1] The evidence is omitted.

For the purposes of the case he would assume that it did not; for the purposes of to-day he should assume that the law about working upon people by fright did not apply to the case of a child of such tender years as this. Then arose the question, which would be for them to decide, whether this death was directly the result of the prisoner's unlawful act, whether they thought that the prisoner might be held to be the actual cause of the child's death, or whether they were left in doubt upon that upon all the circumstances of the case. After referring to the supposition that the convulsions were brought on owing to the child teething he said that even though the teething might have had something to do with it, yet if the man's act brought on the convulsions, or brought them to a more dangerous extent, so that death would not have resulted otherwise, then it would be manslaughter. If, therefore, the jury thought that the act of the prisoner in assaulting the girl was entirely unconnected with it, that the death was not caused by it, but by a combination of circumstances, it would be accidental death and not manslaughter.[1] *Not guilty.*

[1] Compare Reg. v. Murton, 3 F. & F. 492. In charging the jury in that case BYLES, J., said: —

Within a few hours of her death the woman said that her husband had caused her death, but to some of the witnesses she said that he had "broken her heart," and that being turned out of her home had caused her death. Taken all together these dying declarations are, perhaps, more in favor of than against the prisoner; for if the woman died of a broken heart, and from anguish at being turned out of her home, it would not be a case of manslaughter. To constitute that crime there must have been some physical or corporeal injury, negative or positive, as a blow, or the deprivation of necessaries, or the like. Almost the last thing she had said was, "That villain has broken my heart." There was, however, violence, which, according to the evidence, *might* have accelerated her death. . . . It is clearly the law that if the death was accelerated by violence, so that death happened sooner than it otherwise would have done, that is homicide. It is not murder, unless death was intended, but it is manslaughter if the violence hastened the death. Mere unkind or unhusbandlike usage is not enough, and there must be violence, physical or corporeal. If the being treated so and turned out of her home had preyed upon her spirits and broken her heart, it is not a case of manslaughter, and human tribunals can take no cognizance of it as a criminal offence. The question, then, for you lies in a very narrow compass indeed. The question is, was the violence used towards the deceased on the kitchen floor on that night the cause of her death in this sense — that it hastened her death? That is, did it cause her to die sooner than she otherwise would have died? Did the blows, or the throwing on the floor, or both conjointly, hasten her death, and cause her to die sooner than she otherwise would have done? If so you should find the prisoner guilty; if not, acquit him. — ED.

SECTION IV.

Proximity or Remoteness of Injury.

REX v. GILL.

KING'S BENCH. 1719.

[*Reported* 1 *Strange*, 190.]

AN indictment for throwing skins down into a man's yard, which was a public way, *per quod* another man's eye was beat out. On the evidence it appeared the wind took the skin and blew it out of the way, and so the damage happened.

THE CHIEF JUSTICE [PRATT] remembered the case of the hoy[1] and that in Hobart,[2] where, in exercising, one soldier wounded another, and a case in the year-book, of a man lopping a tree, where the bough was blown at a distance and killed a man. And in the principal case the defendants were acquitted.

CONNECTICUT MUTUAL LIFE INSURANCE CO. v. NEW YORK & NEW HAVEN RAILROAD COMPANY.

SUPREME COURT OF ERRORS, CONNECTICUT, 1856.

[*Reported* 25 *Conn.* 265.]

STORRS, J. The defendants, a railroad company, are charged with having negligently occasioned the death of one Dr. Beach, by which event the plaintiffs, a life insurance company, have been compelled to pay to his representatives, the amount of an insurance effected upon his life; of which amount a recovery is sought in this action. A plea in bar sets forth a payment to the administratrix of the deceased of the damages for which the defendants' negligence had rendered them legally liable, and also a discharge by her. This plea and the demurrer thereto require no examination, as they are immaterial in the view which we take of the declaration.

It is clear from the declaration, that a pecuniary injury has been sustained by the plaintiffs, in consequence of the unlawful conduct of the defendants. If the injury thus set forth be actionable, or an injury in a legal sense, there must be a recovery. . . .

The other branch of our enquiry, relating to the manner in which the injury complained of was brought home to the party claiming to have suffered by it, concerns principles of great practical interest and novel in their present application. The plaintiffs sustain no relations

[1] Amies v. Stevens, 1 Stra. 128. [2] Weaver v. Ward, Hob. 134.

to the authors of the wrong other than that of mere contractors with the party injured; and their contract liability is the medium through which the injury is brought home to them. They justly say, that their loss is in fact distinctly traceable and solely due to the misconduct of the defendants; that the death of Dr. Beach, caused by the defendants, in a legal sense determined the only contingency out of which their liability grew, and brought upon them the consequences of that liability which, through the defendants' unlawful acts, had now become fixed. Still the question remains, notwithstanding this precise exhibition of cause and effect, whether these consequences, of which the deceased was primarily the subject, and which affected the plaintiffs only because they had put themselves into the position of contractors with him, were in a legal view brought home to the plaintiffs, directly or indirectly. The completeness of the proof of connection between the acts of the defendants and the loss of the plaintiffs, does not vary, although it may tend to confuse the aspects of the case. The single question is, whether a plaintiff can successfully claim a legal injury to himself from another, because the latter has injured a third person in such a manner that the plaintiffs' contract liabilities are thereby affected. An individual slanders a merchant and ruins his business; is the wrongdoer liable to all the persons, who, in consequence of their relations by contract to the bankrupt, can be clearly shown to have been damnified by the bankruptcy? Can a fire insurance company, who have been subjected to loss by the burning of a building, resort to the responsible author of the injury, who had no design of affecting their interest, in their own name and right? Such are the complications of human affairs, so endless and far-reaching the mutual promises of man to man, in business and in matters of money and property, that rarely is a death produced by a human agency, which does not affect the pecuniary interest of those to whom the deceased was bound by contract. To open the door of legal redress to wrongs received through the mere voluntary and factitious relation of a contractor with the immediate subject of the injury, would be to encourage collusion and extravagant contracts between men, by which the death of either through the involuntary default of others, might be made a source of splendid profits to the other, and would also invite a system of litigation more portentous than our jurisprudence has yet known. So self-evident is the principle that an injury thus suffered is indirectly brought home to the party seeking compensation for it, that courts have rarely been called upon to promulgate such a doctrine. The case, however, of Anthony *v.* Slaid, 11 Met. 290, referred to at the bar, is in point. A contractor for the support of paupers had been subject to extra expense by means of a beating which one of those paupers had received, and he sought from the assailant a recovery of the expenditure. But the court held that the damage was remote and indirect; having been sustained not by

means of any natural or legal relation between the plaintiff and the party injured, but by means of the special contract by which he had undertaken to support the town paupers.

The case, however, would present a different aspect, if by virtue of the contract between the railroad company and the deceased, a direct relation was established between the former and the insurers. If the contract for the transportation of Dr. Beach safely, either in its terms, or through its necessary legal incidents, or by fair inference as to the intent of the parties, devolved upon the railroad company a duty towards the present plaintiffs, the latter might sue for a violation of that duty. An obligation thus imposed will not always require a suit for its breach to be brought by a party to the contract; an independent right of action resides in the party to whom the duty was to be performed. In this respect there is no difference between an obligation imposed by law and by contract. Where the duty of keeping a highway is lodged in a certain quarter by statute, the way is to be kept in repair by the public, for everybody, and when any person is injured by its defects, the breach of duty is to him, and he has an action for the violation of his right. If a stage-coach proprietor agrees with a master to carry his servant, and injures the latter on the road, he is liable directly to the servant; for although undertaken at the request of and by agreement with another, the duty was directly to the party injured. Longmeid and ux *v.* Holliday, 6 Eng. Law & Eq. R., 563. But it is evident that the present case cannot be brought within the principle of such decisions. It would be unfair to argue, that when two parties make a contract, they design to provide for an obligation to any other persons than themselves and those named expressly therein, or to such as are naturally within the direct scope of the duties and obligations prescribed by the agreement. On this point it is enough to say, that when an agreement is entered into, neither party contemplates the requirement from the other, of a duty towards all the persons to whom he may have a relation by numberless private contracts, and who may therefore be affected by the breach of the others' undertakings. We cannot find that any public law charged the present defendants with any duty to the plaintiffs regarding Dr. Beach's life; nor can we see that Dr. Beach exacted, either expressly or by reasonable intendment, any obligation from the defendants towards the insurers of his life, when he contracted for his transportation to New York. Had the life of Dr. Beach been taken with intent to injure the plaintiffs through their contract liability, a different question would arise, inasmuch as every man owes a duty to every other not intentionally to injure him.

We decide, that in the absence of any privity of contract between the plaintiffs and defendants, and of any direct obligation of the latter to the former growing out of the contract or relation between the insured and the defendants, the loss of the plaintiffs, although due

to the acts of the railroad company, being brought home to the insurers only through the artificial relation of contractors with the party who was the immediate subject of the wrong done by the railroad company, was a remote and indirect consequence of the misconduct of the defendants, and not actionable.

BOSCH *v.* BURLINGTON & MISSOURI RIVER RAILWAY COMPANY.

SUPREME COURT OF IOWA, 1876.

[*Reported* 44 *Ia.* 402.]

IT is alleged in the petition that plaintiffs are the owners of certain lots in the city of Burlington upon which they had costly improvements, consisting of a brewery and appurtenances; that one of said lots, being No. 25, is bounded on the east by Front street, and others are immediately back of, or west from said lot 25; that said lot 25 is bounded on the south by Angular street; that according to the city plan Front street extends from the easterly line of said lot 25 to the Mississippi river, its width being governed by the meander line of the river, and in front of lot 25 being sixty feet wide, and that said Angular street also extended to the river, which gave the plaintiffs easy access to the river by way of said streets.

It is further alleged that the defendant entered upon said Front street and said Angular street, and by deposits of earth filled Front street to the east in the river so as to make the space between the lots and the river at least eight hundred feet, and laid down thereon a number of railroad tracks within a few feet of each other on the entire width of said street and to within a few feet of plaintiffs' lots, and built thereon warehouses, depots and other buildings, and continued to occupy the same with said buildings and freight cars, using the premises as a car yard and for making up trains, and so entirely obstructed the same as to entirely divert its use as a street, so that neither said Front or Angular streets east of plaintiffs' lots could be used for the purposes of an ordinary highway; that the city of Burlington, previous to October, 1871, had provided an efficient fire department with steam engines, hose and all necessary appliances for the extinguishment of fires, and that about October, 1871, a building situated about one block north of plaintiffs' lots and across a street eighty feet wide from the block in which plaintiffs' lots are situated accidentally took fire; that no combustible material was nearer said fire in the direction of plaintiffs than about one hundred feet; that the firemen with their engines were on the ground in a few minutes after the fire began and an hour before the fire reached the block in which

plaintiffs' lots are situated; that during all that time the firemen used all efforts to reach the river with the engines and hose, but the street was so occupied and encumbered by the railroad that it could not be done, nor could the river be reached in any other way, on account thereof, and that on account of the said illegal obstructions put in the way by the defendant the fire communicated to the plaintiffs' property which was entirely destroyed; that but for said obstruction the river could and would have been reached and water procured, and said fire would have been extinguished before it reached plaintiffs' property. Damages are claimed for the value of the property destroyed by fire, amounting to over $22,000.

To this petition there was a demurrer, which was sustained and the cause was dismissed at plaintiffs' cost, and they appeal.

ROTHROCK, J. Aware as we are of the difficulty in many cases in determining whether damages claimed should be regarded as proximate or remote, yet we are united in the opinion that the court below correctly determined that no recovery can be had upon the allegations in this petition, for the reason that the damages are not the direct and proximate result of the wrongs complained of, but are too remote. In the case of Insurance Company *v.* Friend, 7 Wallace, 49, it is said: "We have had cited to us a general review of the doctrine of proximate and remote causes as it has arisen and has been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations."

We do not regard the facts of this case as an approach to the dividing line where distinctions become shadowy and discriminations difficult to be made. If any damages were recoverable for the obstruction of the streets by an improper construction of defendant's road, thus depriving plaintiffs of convenient access to the river, they were recoverable by reason of the obstruction of the streets, and simply because the streets were obstructed, and not by reason of a fire, which could not be extinguished because the defendant occupied and used the streets for a railroad.

We have examined the cases cited by counsel for appellants, and although they are ingeniously presented, yet the facts in this case are so widely different from any of them that we cannot regard them as applicable. The nearest approach to this case is that of the Metallic Compression Co. *v.* Fitchburg Railroad Company, 109 Mass. 277. In that case the facts were that plaintiff's manufacturing establishments, situated about fifty feet from defendant's railroad track, were on fire. Two fire engines were brought on the ground, the hose was laid across the railroad track to a hydrant, and water was being thrown on the fire which was being diminished. A freight train approached,

and although warned in time, the employees of defendant negligently ran across the hose, severing it, and stopping the supply of water, and the building was burned. The defendant was held liable.

We suppose without question that if one should in any manner, by cutting the hose, disabling the engine or the like, stop the stream of water by reason of which act property is destroyed he would be liable, because the damages are the direct and proximate result of his act. But in the case at bar the building of the railroad tracks and depots, the widening and filling the streets have no connection with the fire, nor with the hose or other apparatus of the fire companies. They are independent acts, and their influence in the destruction of plaintiffs' property is too remote to be made the basis of recovery.

Affirmed.

not in Hand

HOLLENBECK *v.* JOHNSON.

SUPREME COURT OF NEW YORK, 1894.

[*Reported* 79 *Hun*, 499.]

HARDIN, P. J. January 3, 1892, the parties resided in the village of Fabius. The plaintiff was in possession of twenty-two acres of land as a tenant, which he had occupied some four years; and upon the premises so occupied by him was a barn, about five rods north of and fronting on North street, in which barn were several doors opening toward the street. The barn had been built some forty-five years. Under the floor, near the north side of the barn, was a cistern about ten feet across the top and about nine feet deep, over which were stringers about three feet apart. The cistern had been covered over with inch hemlock boards about two feet below the barn floor. On that day the plaintiff kept in the barn his hens, hay and fodder, and a cow and a horse. There was no road fence in front of the barn, and the small door of the barn was allowed by the plaintiff to remain open on the day in question, "and there was nothing to prevent cattle passing along said street from entering said barn through said small door." Some fifty rods distant from the barn of the plaintiff the defendant resided, and was the owner of a cow which he kept on his premises, which cow weighed about 800 pounds. About one o'clock of the 3d of January, 1892, the defendant led his cow from his barn into an inclosed yard south of and adjoining his barn; closed the gate through which the cow had entered the yard, and fastened it on the inside with a wooden pin and on the outside with a hook and staple. The yard was fenced all around by a picket fence and a high board fence some four feet high. About two o'clock in the afternoon of the day the defendant went to his yard, and found the little gate open and the cow gone, and he immediately commenced to search for her and continued his search until about four-thirty P. M., when he learned that there was a

cow in the cistern under the plaintiff's barn, and there found the fact to be that his cow was then in the plaintiff's cistern. It appears the defendant's cow escaped from his inclosure without any fault of his and passed over his premises to the premises of the plaintiff and entered through the small door of plaintiff's barn to a point over the cistern, and when she reached the sleepers of the floor over the cistern they gave way, being very much decayed and impaired by age, and the cow fell into the cistern "carrying down with it three sleepers, and the plank under said cow also broke and said cow fell down into the cistern, and when found had one horn loosened and her skull broken." "The hole made in the floor by the cow breaking through was about three feet across, but with irregular edges."

The referee finds, viz.: "That about three o'clock in the afternoon of January 3, 1892, the plaintiff, George Hollenbeck, went to the barn so occupied by him as aforesaid, and saw some cattle tracks on the outside, by the barn door, and then went into the barn through the small door, but discovered no cattle there, and then went into the granary, which was a little northwest of the place where the break in the floor occurred, and got some feed for his hens and returned to the front part of the barn and there threw it down. Plaintiff then started to go where his cow was in the lean-to or addition to see if she was loose, and in going in that direction and upon that errand fell into the cistern through the hole made by defendant's cow when she fell through the floor. . . . Plaintiff did not observe any break or defect in the floor, and did not know of any break or defect therein until after he had fallen into said cistern." It is found that the plaintiff sustained some injuries about the shoulders and neck by the fall. It is found that the plaintiff at the time of said injuries, and for "some years previous thereto, knew that there was a cistern under said barn, . . . and was informed and knew that a board covering had been placed over it about two years previous to the time of the injury, but never had been under the barn and did not know the exact place where said cistern under said barn was located." And the referee finds: "Plaintiff had not, at the time of said injury, nor at any time previous thereto, any knowledge or information that said barn floor or the timbers upon which it rested were weak and rotten or in any way defective and unsafe. An examination of said sill and sleepers made under the barn previous to said injury would have revealed the weakness and rottenness subsequently found to exist, but plaintiff, having no knowledge of such weakness and rottenness previous to the injury, made no examination of them."

The referee found: "There was no evidence given upon the trial showing, or tending to show, that defendant's cow assaulted plaintiff's person, nor that she in any manner injured his person by coming in contact with it." "That there was no evidence given upon the trial showing or tending to show that defendant's cow was vicious, unruly

or ugly." "That in the keeping and care of his cow defendant has in all things exercised proper care, and when his said cow escaped from the yard, as stated in the fourth finding of fact, it was without fault or negligence on his part."

In the conclusions of law the referee stated that the plaintiff was not bound to maintain a fence upon the highway; that his failure to fence the street or highway does not prevent a recovery in an action of trespass where the entry upon his premises was from the street, and that the entry of the defendant's cow upon the premises of the plaintiff from the highway into his barn and the breaking down of the sills, sleepers and floor "is a trespass for which the plaintiff in this action is entitled to recover against the defendant herein one dollar." He also found, as matter of law, "that the plaintiff is not guilty of any contributory negligence or want of care that would debar him from a recovery in this action, for the injury to his person caused by falling into the cistern, as stated in the sixth finding of fact herein." "That the plaintiff in this action cannot recover of the defendant herein any damage for the injury to his person caused by his falling into the cistern, as stated in the sixth finding of fact. That the injury to plaintiff's person caused by his falling into the cistern is not proximately connected with the trespass of the defendant's cow, and any damage resulting to plaintiff's person from such fall is remote and consequential, and no recovery therefor can be had in this action. That the defendant is not chargeable in this action with any want of care or prudence in taking care of his cow. That the injury suffered by plaintiff by falling into the cistern was not such as would usually and probbably result from the escape and subsequent trespass of defendant's cow, and was not such an injury as might reasonably have been anticipated from such trespass. That the injury to plaintiff's person caused by falling into the cistern was not such as defendant could, with the exercise of ordinary care, prudence and foresight, have guarded against." Ample evidence was given to sustain the findings of fact made by the learned referee. It is now insisted, in behalf of the appellant, by his learned counsel, and, we think, correctly, that the defendant is answerable "for his own trespass, and also for that of his domestic animals." (Dunckle *v.* Kocker, 11 Barb. 387; Fairchild *v.* Bentley, 30 id. 155; Van Leuven *v.* Lyke, 1 Comst. 515; Dickson *v.* McCoy, 39 N. Y. 400; Wells *v.* Howell, 19 Johns. 385.)

It is contended by the appellant's counsel that inasmuch as the cow made the hole while trespassing upon the plaintiff's premises, into which the plaintiff fell and received the injuries complained of, that he can recover for such injuries; and it is contended "that the damages were the immediate and natural consequence of the trespass . . . and that the defendant is liable for the entire damages sustained by the plaintiff. . . ."

The facts and circumstances arising in the case in hand strongly

indicate that no human foresight would apprehend that any such result would follow, or that the defendant at the time he led his cow out of the barn at one o'clock and placed her securely in his yard adjacent to his barn could foresee that in some unexpected way the gate to his yard would be opened, and the cow pass off his premises down the street, and enter the door of the barn of the plaintiff, if found open, and go into the barn across the floor over a cistern under the floor, and that the floor over the cistern would be so much decayed that it would fall in the manner in which the evidence discloses it did, and leave an aperture which would be subsequently visited by the plaintiff, who, without giving full attention to his movements, would fall through the floor into the cistern, and receive the injuries of which he complains in this action. We think the damages sustained by the plaintiff were not the proximate result of any wrongful act of the defendant, and that they were too remote, and that the learned referee properly refused to award damages to the plaintiff sustained in consequence of the fall into the cistern. The conclusions reached by the learned referee are approved, and the judgment entered thereon should be affirmed.

MARTIN and MERWIN, JJ., concurred.

Judgment affirmed, with costs.

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CENTRAL OF GEORGIA RAILWAY COMPANY *v.* PRICE.

SUPREME COURT OF GEORGIA, 1898.

[*Reported* 106 *Ga.* 176.]

SIMMONS, C. J. The record discloses that Mrs. Price was a passenger on a train of the defendant company, and that her destination was Winchester, Georgia. Through the negligence of the conductor, she was not put off at Winchester, but was carried on to Montezuma. Upon her arrival at the latter place, the conductor advised her to go to the hotel and spend the night, he agreeing to carry her back to Winchester in the morning when his train made the return trip. He accompanied her to a hotel where a room was assigned her, the conductor agreeing with the proprietor to pay her expenses. She was taken to her room by the proprietor or his servants, and furnished with a kerosene lamp which she left burning after she had retired to bed. Sometime during the night the lamp, she claims, exploded and set fire to a mosquito net which covered the bed, and in her efforts to extinguish the flames her hands were badly burned. . . .

The injury was occasioned by the negligence of the proprietor of the hotel or his servants in giving her a defective lamp. The negligence of the company in passing her station was, therefore, not the

natural and proximate cause of her injury. There was the interposition of a separate, independent agency, the negligence of the proprietor of the hotel, over whom, as we have shown, the railway company neither had nor exercised any control. Civil Code, §§ 3912, 3913; Perry *v.* Central Ry., 66 Ga. 746; Mayor etc. of Macon *v.* Dykes, 103 Ga. 847; South-Side etc. Co. *v.* Trich, 117 Pa. St. 390, 11 Atl. 627; Wood *v.* Railway Co. 117 Pa. St. 306, 35 Atl. 699; Lewis *v.* Ry. Co., 54 Mich. 55, 19 N. W. 744; Hoag *v.* Ry. Co., 85 Pa. St. 293; Sira *v.* Ry. Co., 115 Mo. 127, 21 S. W. 905; Gulf etc. Ry. Co. *v.* Shields, 9 Tex. Civ. App. 652, 29 S. W. 652; Smith *v.* Bolles, 132 U. S. 125. The injuries to the plaintiff were not the natural and proximate consequences of carrying her beyond her station, but were unusual and could not have been foreseen or provided against by the highest practicable care. The plaintiff was not entitled to recover for such injuries, and the court erred in overruling the motion for new trial.

Judgment reversed.

CLARK *v.* GAY.

SUPREME COURT OF GEORGIA, 1901.

[*Reported* 112 *Ga.* 117.]

W. W. Clark alleged, that A. A. Gay endamaged him one thousand dollars or other large sum, for that said Gay sought one of the hired servants (a colored man) of petitioner, for the sole purpose of having a difficulty with him; that he approached said negro near the premises of petitioner, with the intention of raising a difficulty with him, wilfully, and in bad faith toward petitioner, [and] did raise a difficulty with said negro, who at once fled from said Gay toward petitioner's house, said Gay pursuing him with pistol in hand; that Gay forced said negro into petitioner's yard and on into petitioner's house, and therein murdered said negro near where petitioner's infant child was lying asleep; that said acts and said murder were committed by said Gay in the presence of petitioner's family, wilfully and with intent to wrong petitioner, which terrorized and frightened them away from their said home, which ever since they have absolutely abandoned, and refuse to live in the house or in any manner occupy the same, thus rendering said house useless to petitioner, which house was worth, before committing said crime in same, $500 or other large sum to petitioner. Beside the prayer for process, judgment is prayed against Gay for $1,000.

LEWIS, J. After a careful study of the petition, the only definite purpose that we can gather from it is to recover the value of the plaintiff's house on account of the defendant's unlawfully pursuing a servant of the plaintiff and killing him in the house. There is no

allegation of actual physical damage done to the house, nor is there anything to show that it was not in as good condition after the homicide as before. We cannot imagine, therefore, how the value of the house can be made the measure of the damage alleged to have been caused by the wrongful conduct of the defendant.

The petition in this case is too loose and indefinite to support a recovery of any kind. We do not mean to say that the conduct charged against the defendant could not be made the basis of a valid civil action against him in favor of the plaintiff. An action might have been sustained for the unlawful killing of the plaintiff's servant, to recover damages for the loss of the services of the servant. There might also have been a suit for trespass and invasion of the plaintiff's home, or for injury to his peace and happiness, resulting from the outrage committed in the presence of his family. This suit, however, embraces none of these elements. Taken as a whole, the petition excludes the idea that the plaintiff is seeking damages of any kind save those mentioned in the preceding division of this opinion; and it is too indefinite to be sustainable on any theory.

Judgment affirmed.

ELLIOTT v. ALLEGHENY COUNTY LIGHT COMPANY.

SUPREME COURT OF PENNSYLVANIA, 1903.

[*Reported* 204 *Pa.* 568.]

POTTER, J. The appellant, while engaged as a painter, fell from, or with, a ladder that slipped from its proper position, while he was using it. In the effort to save himself he reached out, while in the act of falling, and clutched at an electric light wire, which was supported from brackets at the side of the building. It is claimed that this wire was not properly insulated, and for that reason the appellant was shocked and burned, and was possibly thereby prevented from mitigating the force of his fall.

At the close of the testimony, the trial judge gave binding instructions in favor of the defendant, upon the ground that the proximate cause of the plaintiff's injuries was his fall from the ladder; and not his grasping the wire in the line of the fall. This view was manifestly correct. It is undisputed that the defendant was in nowise responsible for the slipping of the ladder, which was the originating cause of the plaintiff's fall. It would be speculative in the extreme, to attempt to differentiate between the extent of the injury which he did receive, and that which he would probably have received, if he had not come in contact with the electric light wire in the course of his fall. It is quite possible that the wire helped to break the fall, and thus lessen the

extent of the injury. But even if the presence of the wire in the condition in which it was, made the consequences of the fall more serious, yet it did not bring about the accident, nor was it in any sense the efficient responsible cause of the injury.

It was the duty of the learned trial judge, upon the admitted facts of this case, to determine the question of proximate cause, and he was right in refusing to submit it to the jury.

The judgment is affirmed.

WINEBERG *v.* DUBOIS BOROUGH.

SUPREME COURT OF PENNSYLVANIA, 1904.

[*Reported* 209 *Pa.* 430.]

POTTER, J. The plaintiff while walking along the board walk upon a public street of the borough of DuBois, on a dark rainy evening, fell from the walk upon the side next the property line, and sprained her knee.

Plaintiff was confined to her bed for six weeks or more and was not able to move about until July. After that she was able to walk on crutches until September. After September she was able to get along with a cane, and by supporting herself by leaning on objects in the room. Her knee was stiff and still pained her. On February 23, 1903, she had a second fall which she says was caused by her well foot slipping and by reason of her other leg being stiff she could not save herself from falling, and as a result, she received additional injury to the limb which had been hurt before. She testified on cross-examination that she did not use a cane at that time when walking about in the house. After the second accident, plaintiff's condition was worse; she suffered very much and had to go to bed again. She has never been able to walk without crutches since that time. The doctor testified that the fall made the condition of the leg worse in that it inflamed it but that it made it better by limbering up the stiff joint.

The court below submitted the question to the jury whether the negligence of the borough was the proximate cause of the second accident, in the following language: "There is still another question involved in this case and that is, what effect the second accident which happened to this woman had upon her claim. And upon that we say to you, that all persons in life are required to exercise due and proper care in all their relations of life, and this woman after she was injured by the fall on the pavement was required to exercise due care, not only in performing her household duties but on the streets and every place else and if she failed to exercise due care in walking around and as a result of her negligence she was injured a second time she could not recover for the second injury. . . . At the same time I understand

the plaintiffs were claiming that the second accident was the result of the first one, and I was just coming to that branch of the case. That if a person is injured and crippled, and as a result of that it is impossible with safety to walk through the house or about the streets, and if in walking about and exercising due care a second accident results, why that results from the first accident, because if it had not been for the first accident the second wouldn't have occurred. . . . As I said before, the question arises whether the second accident was the result of negligence or not. If it was not, of course the borough would not be liable the same as for the first."

This instruction was too broad. It made the borough liable for the result of the second fall, even though it were purely accidental. The second accident did not occur upon the streets of the borough, but in the house of the plaintiff. It was not caused by the injured leg, but by the slipping of the sound foot. It does not seem that counsel for the plaintiff intended to charge the defendant with the results of this second fall, for they expressly disclaimed any intention of claiming damages upon that account, when the testimony was offered, and said that they only sought to use it as accounting for the condition of the plaintiff. Yet the court in the charge called the attention of the jury to the pain and suffering resulting from the second accident. We think it is clear from the evidence that the first injury was not in any way the proximate cause of the second accident, and that the jury should have been instructed not to include its results in awarding damages for the negligence of the defendant in causing the first injury to the plaintiff.

The question of whether or not the plaintiff was guilty of contributory negligence in not taking proper care of herself at the time she suffered the second fall does not arise in this case. The mistake of the trial judge was in holding that there was any relation of cause and effect between the two accidents. We see none, under the testimony.

The seventh assignment of error is sustained, and the judgment is reversed, with a venire facias de novo.[1]

MARSH v. GILES.

SUPREME COURT OF PENNSYLVANIA, 1905.

[*Reported* 211 *Pa.* 17.]

FELL, J. The facts that give rise to the question involved are these: The defendants owned a stone yard which fronted on a main street and extended back to a narrow street on which the children

[1] See also Wieting v. Millston, 77 Wis. 523. — ED.

who lived in the vicinity were accustomed to play. Some days before the accident the defendants had placed on the unpaved footways of the back street a number of stones, one of which, three feet long, about six inches wide and three inches thick, was in a slanting position, one end resting on the ground and the other against an electric light pole. One of the plaintiffs, a boy not quite seven years of age, lived with his father, the other plaintiff, on the opposite side of the street. He had seen a policeman strike the pole with his club when the light had accidentally gone out. He suggested to a companion nine years of age that they light the electric light by jarring the pole as they had seen the policeman do. The younger boy placed his arms around the pole and the elder boy, standing on the other side of the pole, drew the upper edge of the stone back and then pushed it forward or let it fall against the pole. While they were thus engaged, a finger of the younger boy got between the stone and the pole and was injured.

The jury were instructed that the use of the footway for the storage of stone was unauthorized, and that if the situation at the time was such as would have caused a reasonably prudent person to apprehend danger to an adult or child, the defendants were negligent and a verdict might be rendered against them.

A finding of negligence in placing the stone against the pole in the footway was not conclusive against the defendants. There still remained the question whether their negligence was the proximate cause of the injury. On this the case turned. If we assume that the defendants had no right to place the stone on the footway and were negligent in so doing, they were liable only for the natural and probable consequences of the wrongful act. An injury occasioned by the stone falling on a person passing, or by its being pushed over by children playing on the street, would have been a direct consequence of the defendants' act and one which they were bound to foresee. But the plaintiff's injury was the immediate consequence, not the position of the stone as placed by the defendants, but of the independent, intervening act of the plaintiff's companion in making a use of the stone not reasonably to have been foreseen. If the stone had been flat on the ground and the injury had resulted from an attempt to lift it, or had it been a smaller stone which the boy could have taken in his hand and the injury had resulted while he was pounding the pole with it, the want of causal connection between the act of the defendants and the injury would not have been more clear. The plaintiff's injury could not reasonably have been contemplated as a result of the defendants' act in placing the stone on the footway. It was caused by the wholly unrelated and unforeseen act of another. The case is unlike that of Rachmel *v.* Clark, 205 Pa. 314, where the owner of a slate factory negligently permitted a slab of slate to stand on the pavement, or on ground so close to the building line as not to be distinguished from

the pavement, in such position that it fell on a boy who leaned against it.

The judgment is reversed and judgment is now entered for the defendants.[1]

CLARK v. WALLACE.

SUPREME COURT OF COLORADO, 1911.

[*Reported* 51 *Colo.* 437.]

MUSSER, J. This writ of error was sued out to review a judgment in favor of Wallace, who was defendant below. Clark owned 160 acres of standing peas, upon which he was feeding and fattening about 1200 sheep. The sheep and peas were in charge of a herder in the employ of Clark. The herder lived there with his wife and two children. On a certain day, Wallace, who had a ranch nearby, was engaged in dipping sheep, and it became necessary for him to have more help. He caused Clark's herder to be asked to come over and help in dipping the sheep, and stated that he would pay the herder. After a time the herder came over. While he was at Wallace's, a fire started in or near Clark's field of peas. It was evidently started by the herder's wife, or boy, or both. There was a high wind blowing, and the fire soon got beyond control and extended to the field of peas and destroyed them.

Clark brought an action to recover from Wallace the damages sustained by him on account of the loss of the peas. After the evidence was in, the court instructed the jury to render a verdict in favor of Wallace, which was done, and, upon this verdict, judgment was entered against Clark. We will not stop to consider whether or not Wallace would be liable for any damage that might have resulted to Clark in consequence of the herder being induced to leave his work. If Wallace was liable for any damage at all, which we do not determine, it was only for such damage as was "the actual, natural and approximate result of the wrong committed."— Clifford *v.* D., S. P. & P. R. R., 9 Colo. 333. "The rule is general that a person is not to be held responsible in damages for the remote consequences of his act, or indeed for any but those which are proximate or natural."— 8 Am. & Eng. Encyc. of Law, 561. In D. & R. G. R. R. Co. *v.* Sipes, 26 Colo. 17, it is said, that proximate cause is "that cause which, in natural and continued sequence, unbroken by any efficient intervening cause, produced the result complained of, and without which that result would not have occurred"; or "that cause which immediately precedes and directly produces an effect, as distinguished from a remote, mediate, or predisposing cause."

[1] See Schwartz *v.* California Gas & Electric Corp., 163 Cal. 398. — ED.

Whether an act was the proximate cause of damage, is ordinarily a question for the jury, but when the facts are undisputed and are susceptible of but one inference, the question is one of law for the court.—D. & R. G. R. R. Co. *v.* Sipes, *supra.* The only damage that Clark sought to recover, and of which there was any evidence, was that which he had sustained by reason of the burning of the peas. It cannot be said that the natural result of the herder's absence was that some member of his family would start a fire and that the wind would be high and would fan that fire so that it would extend to and destroy the peas. It cannot be said that the herder's absence in natural and continued sequence, unbroken by any efficient, intervening cause, produced the result complained of, for the setting out of the fire by his family was not a natural and continued sequence of the herder's absence, but it was an efficient, intervening cause, coming in after the absence of the herder and could not have been anticipated as a natural result of the absence. It cannot be said that, if the herder had been present, the fire would not have been started, or the wind not have been high. The cause of the fire was not the absence of the herder, but it was plainly the action of his family, and this action was not the natural and legitimate sequence of his absence. The fire might have been started just as well with him present, on some portion of the 160 acres of peas, and the wind would have blown just as hard.

The substantial facts in this case are undisputed, but if the evidence on the part of the plaintiff be alone considered, there is but one inference to be drawn from it and that is, that the absence of the herder was not the proximate cause of the destruction of the peas. The judgment is, therefore, affirmed.

Judgment affirmed.

CHAPTER III.

LIABILITY BASED ON PROXIMATE CAUSATION.

SECTION I.

Direct Application of Force.

STATE v. O'BRIEN.

SUPREME COURT OF IOWA. 1890.

[*Reported* 81 *Iowa*, 88.]

THE defendant was indicted for the crime of murder, and upon a trial was found guilty of manslaughter. He was adjudged to be imprisoned for two years at hard labor in the penitentiary at Anamosa, and to pay the costs, and from that judgment he appeals.

ROBINSON, J.[1] It is suggested that the verdict is not supported by the evidence, and that it is not shown that the death of Stocum resulted from injuries inflicted by the defendant. The evidence shows that decedent had not been in good health for several months. About three weeks before the assault in question, he consulted a physician, who found his heart in a diseased condition, and treated him for heart difficulty. He improved steadily under that treatment until the assault was made. If his testimony at the preliminary examination and his dying declaration were correct, he was choked and kicked and otherwise grossly maltreated by defendant. It is certain that he was greatly excited by the encounter. Immediately after it occurred he applied at a house in the vicinity for shelter, stating that he was afraid to go home on account of defendant and the Murphy boys. A witness says of his appearance at that time: "He acted just scared to death. His face was as pale as death; his lips were swollen. His hat was torn and had mud on both sides." His health failed rapidly from that time. A witness who saw him the day after the assault describes his appearance and condition as follows: "I discovered he was in pretty bad shape; he was pale, haggard; almost impossible for him to breathe. I thought he would reel right over on the stoop there. His shoulder-blades worked like a bellows. His voice was weak. His lips, dark blue." The medical testimony shows that his condition and failing health after the assault, and his death, were natural and probable results of his physical condition on the night of July 15, and of great excitement and physical exertion.

It was the province of the jury to determine whether the wrong of defendant caused or contributed to decedent's death. The fact that he was afflicted with a disease which might have proved fatal would not

[1] Part only of the opinion is given.

justify the wrongful acts of defendant, nor constitute a defence in law. State *v.* Smith, 73 Iowa, 32. Nor would ignorance on the part of defendant of the diseased physical condition of Stocum excuse his acts. State *v.* Castello, 62 Iowa, 404. We think the evidence sufficient to sustain the verdict, and find no error prejudicial to defendant of which he can complain.

The judgment of the district court is affirmed.

ARMSTRONG *v.* MONTGOMERY STREET RAILWAY CO.

SUPREME COURT OF ALABAMA, 1899.

[*Reported* 123 *Ala.* 233.]

THIS action was brought by the appellant, L. J. Armstrong, as administratrix of the estate of Charles Armstrong, deceased, against the appellee, to recover damages for personal injuries alleged to have been inflicted on plaintiff's intestate, by reason of the negligence of the defendant or its employes, and which resulted in the death of plaintiff's intestate.[1]

MCCLELLAN, C. J. As to the intestate's injuries and death, the testimony, as given by the physician who attended him, was as follows. . . . "He had no wounds except those on the head and hand, and no other positive evidences of hurt on his body as far as I could see. Those wounds did not directly produce death. They produced septicemia which caused his death. By septic infection is meant poisoning of the system from germs, or products of germs, introduced into the blood through wounds, or other sources; it is a paralysis of the system due to the presence of germs or particles of germs in the system." Upon this evidence it is sought to justify the affirmative charge for the defendant, which was given by the trial court; the contention being that, if believed by the jury, it showed that the injury sustained by the intestate was not the proximate cause of his death, but that his death was the result of an independent, intervening cause, to wit: the septicemia, or blood poisoning which set in or began to infect his system several days after the injuries were received. It is difficult to conceive how this position can be even plausibly supported. It is clear on this evidence that intestate's death resulted in direct line and sequence of causation from the injuries he received in the fall from the car. So far from there being an independent, superseding or responsible cause of death other than these injuries, there is absolutely no other cause shown or hinted at in this evidence. The fall produced the injuries; the injuries produced blood poisoning, and the blood poisoning produced death. There was no break in the chain of causation from the alleged negligent act to the death of intestate. The blood poisoning was not an in-

[1] Several points were raised in this appeal, of which one only is considered here.—ED.

dependent cause. It was not a superseding cause. It was itself a result, or, perhaps more accurately, a mere development of the injuries. It is not an important consideration, even if it be a fact, that blood poisoning is not a usual and ordinary result or development of wounds of the character inflicted upon the intestate. It is not of consequence that the defendant or its motorman did not have the infection of septicemia in contemplation when the intestate was injured. They did not, we take it, have in contemplation even the mashing of his hand, and if they did they would be guilty much beyond the charges made by this complaint. The logical rule in this connection, the rule of common sense and human experience as well, (if indeed there can be a difference between a logical doctrine and one of common sense and experience, as some authorities appear to hold), is that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind.— 1 Sher. & Red. Negligence, § 29. That there was a reasonable possibility of blood poisoning being developed or produced by the wounds which intestate received admits of no controversy. That blood poisoning did result from the wounds is to like degree clear on the evidence; and confessedly blood poisoning produced death. Death was, therefore, within the range of responsibility for the negligent act which inflicted the wounds; and instead of the affirmative charge for defendant being justified on the theory that the evidence showed that death did not result from the injuries, the court might well have instructed the jury to find that the injuries did produce the death if they believed the evidence.[1]

GRAY v. CHICAGO & NORTHWESTERN RAILWAY CO.

SUPREME COURT OF WISCONSIN, 1913.

[*Reported* 153 *Wis.* 637.]

WINSLOW, C. J.[2] It appears from the evidence that the plaintiff received severe bruises, wounds, and contusions on the head, body, and hips at the time of the accident; that several ribs were broken, and that he was in bed two weeks; that his left arm is still partially paralyzed; that he suffers pain in the left arm and shoulder practically all the time; that he is incapacitated for physical labor; is afflicted with occasional spells of dizziness; and that his average weight is reduced

[1] See also McGarrahan v. New York, N. H. & H. R. R., 171 Mass. 211, 50 N. E., 610; Ginna v. Second Ave. R. R., 67 N. Y., 596.— ED.

[2] Part of the opinion only is given.— ED.

from about 160 pounds to about 130 pounds. The injury was suffered in January, 1911. He was examined by Dr. Connell of Fond du Lac in May, 1912, and it was then found for the first time by examination of his sputum that he had incipient consumption or tuberculosis of the lungs. He testified himself that he had had night sweats and hemorrhages. This testimony was received against objection, and the court refused to instruct the jury, as requested by the defendant, that they could not find that the accident caused the pulmonary tuberculosis from which the plaintiff is suffering. The defendant's contention is that there is no sufficient evidence to establish any causal relation between the physical injury and the tuberculosis which existed more than a year later, and that the relationship between the two is purely conjectural. There was medical testimony to the effect that an injury such as plaintiff received is likely to induce or incite tuberculosis by reducing the natural resistance of the patient, lowering his vitality, and putting him in a condition whereby he is unable to withstand infection. If this testimony were the only testimony tending to show a causal relation between the injury and the tuberculosis we should agree with the defendant's contention. If decreased powers of resistance resulting from an injury are to be considered as a link in the chain of causation between the injury and a disease developing years afterward, it is very evident that a large, if not an almost limitless, field is opened up for speculation by juries in a region where there can be no guide and no probability of just results.

In the present case, however, there was other testimony besides the general testimony above referred to. Dr. E. J. Donohue, who treated the plaintiff for his injuries from the day of the accident in January, 1911, until some time in April following and gave him a thorough physical examination, including an examination of the sputum, about two weeks before the trial in July, 1912, testified directly as follows:

"Such an injury as the one he sustained would cause tuberculosis. It would decrease the resisting forces, tend to give a chance for infection, and give it a chance to loom up. In other words, this germ that is dormant or inactive would or can become active. In my opinion the tubercular condition that I found is the result of this injury, and he is permanently disabled from manual labor."

Here is direct testimony by the physician who treated the plaintiff for his injuries for months, and presumably knew more of their nature and extent than any one else. It appears that he had known the plaintiff for years and had treated his family. He must have been in a favorable position to judge of the actual as well as the probable effects of such an injury upon the plaintiff. He testified positively that in his opinion the tubercular condition was the result of the injury received. We are unable to say that this testimony is beyond the proper scope

of expert medical testimony, and unless we can say that, it seems certain that we cannot hold that a finding that the tubercular condition was caused by the accident is purely conjectural.[1]

McCAHILL v. NEW YORK TRANSPORTATION CO.

COURT OF APPEALS OF NEW YORK, 1911.

[*Reported* 201 *N. Y.* 221.]

HISCOCK, J. One of the appellant's taxicabs struck respondent's intestate on Broadway, in the city of New York, in the night time under circumstances which, as detailed by the most favorable evidence, permitted the jury to find that the former was guilty of negligence and the latter free from contributory negligence. As a result of the accident the intestate was thrown about twenty feet, his thigh broken and his knee injured. He immediately became unconscious and was shortly removed to a hospital, where he died on the second day thereafter of delirium tremens. A physician testified that the patient when brought to the hospital "was unconscious or irrational rather than unconscious. . . . He rapidly developed delirium tremens. . . . I should say with reasonable certainty the injury precipitated his attack of delirium tremens, and understand I mean precipitated, not induced"; and, again, that in his opinion "the injury to the leg and the knee hurried up the delirium tremens." He also stated: "He might have had it (delirium tremens) anyway. Nobody can tell that." Of course, it is undisputed that the injuries could not have led to delirium tremens except for the preëxisting alcoholic condition of the intestate, and under these circumstances the debatable question in the case has been whether appellant's negligence was, legally speaking, the proximate cause of intestate's death. It seems to me that it was, and that the judgment should be affirmed.

In determining this question it will be unnecessary to quote definitions of proximate cause which might be useful in testing an obscure, involved or apparently distant relationship between an act and its alleged results, for the relationship here is perfectly simple and obvious. The appellant's automobile struck and injured the traveler; the injuries precipitated, hastened and developed delirium tremens, and these caused death. There can be no doubt that the negligent act directly set in motion the sequence of events which caused death at the time it occurred. Closer analysis shows that the real proposition urged by the appellant is that it should not be held liable for the results which followed its negligence, either, *first*, because those results would not have occurred if intestate had been in a normal condition, or, *secondly*,

[1] See also East Tenn. Tel. Co. v. Jeffries, 153 Ky. 133, 154 S. W. 1112; Reg. v. Greenwood, 7 Cox C. C. 404.— ED.

because his alcoholism might have caused delirium tremens and death at a later date even though appellant had not injured him. This proposition cannot be maintained in either of its branches which are somewhat akin.

The principle has become familiar in many phases that a negligent person is responsible for the direct effects of his acts, even if more serious, in cases of the sick and infirm as well as in those of healthy and robust people, and its application to the present case is not made less certain because the facts are somewhat unusual and the intestate's prior disorder of a discreditable character. (Tice *v.* Munn, 94 N. Y. 621; Crank *v.* Forty-second Street, M. & St. N. Ave. Ry. Co., 53 Hun, 425; affd., 127 N. Y. 648; Allison *v.* C. & N. W. R. Co., 42 Iowa, 274; Owens *v.* K. C., S. J. & C. B. Ry. Co., 95 Mo. 169, 182.) The principle is also true although less familiar, that one who has negligently forwarded a diseased condition and thereby hastened and prematurely caused death cannot escape responsibility even though the disease probably would have resulted in death at a later time without his agency. It is easily seen that the probability of later death from existing causes for which a defendant was not responsible would probably be an important element in fixing damages, but it is not a defense.

Turner *v.* Nassau Electric R. R. Co. (41 App. Div. 213) was a case singularly similar to this one except that there the physician ventured the opinion that delirium tremens would not have ensued except for the accident resulting from defendant's negligence, whereas in the present case there is no opinion on this point. I think, however, that no presumption can be indulged in for the benefit of the present appellant that delirium tremens would have occurred without its agency. In that case a judgment in favor of the intestate's representative was sustained on the ground that the accident precipitated the delirium tremens which resulted in the death.

In Louisville & N. R. R. Co. *v.* Jones (83 Ala. 376, 382) it was said that if an intestate "had pneumonia or incipient pneumonia at the time she received the injury, and it could be known that she would ultimately die of that disease, this would not necessarily, and as a matter of law, relieve the railroad of all responsibility. If the injury was caused by the negligence of the railroad company . . . and if it contributed and hastened her death, then the corporation would not be guiltless."

In Jeffersonville, M. & I. R. R. Co. *v.* Riley (39 Ind. 568) it was said with reference to a request to charge made by the defendant and denied: "If it was intended to have the court say to the jury, that when a person has a tendency to insanity or disease, and receives an injury which produces death, but which would not have produced death in a well person (the plaintiff cannot recover) the charge was rightly refused. If death was the result of the preëxisting circumstances, and the injury had nothing to do with producing or accelerat-

ing the result, then the injury would not be the cause of death." (See, also, Owens *v.* K. C., S. J. & C. B. Ry. Co., 95 Mo. 169, 182; Foley *v.* Pioneer, M. & M. Co., 144 Ala. 178, 183.)

The responsibility of a person accelerating the death of another already suffering from a disorder which at a later period of itself might have caused death, has been considered in criminal cases and determined in a manner which is adverse to the contention of the appellant here.

In Hale's Pleas of the Crown (p. 428) the rule is laid down: "If a man be sick of some such disease, which possibly by course of nature would end his life in half a year, and another gives him a wound or hurt which hastens his end by irritating and provoking the disease to operate more violently or speedily, this hastening of his death sooner than it would have been is homicide or murder, as the case happens, in him that gives the wound or hurt, for he doth not die simply *ex visitatione Dei*, but the hurt that he receives hastens it, and an offender of such a nature shall not apportion his own wrong." (See, also, Bishop on Criminal Law [5th ed.], § 637.)

In Commonwealth *v.* Fox (73 Mass. 585) the court stated the rule in connection with an indictment charging murder: "If the jury are satisfied on the evidence, that an assault and battery was committed on the deceased by the prisoner . . . and that thereby the death of his wife was hastened, so that it took place sooner by reason of the assault and battery than it would have occurred in consequence of her sickness alone," the indictment might be sustained.

In State *v.* Smith (73 Iowa, 32, 41) the court in a case of alleged murder expressed its opinion and decided as follows: "It surely ought not to be the law that because a person is afflicted with a mortal malady, from which he must soon die, whether his ailment be caused by natural or artificial causes, another may be excused for acts of violence which hasten or contribute to or cause death sooner than it would otherwise occur." (See, also, Rex *v.* Martin, 5 C. & P. 128, 130; Regina *v.* Plummer, 1 C. & K. 600, 607.)

I think the judgment should be affirmed, with costs.

CLIFFORD *v.* DENVER, SOUTH PARK & PACIFIC RAILROAD.

SUPREME COURT OF COLORADO, 1886.

[*Reported* 9 *Colo.* 333.]

HELM, J. To sustain the judgment of the district court, counsel for defendant in error urge a single proposition, viz., that the amended complaint does not state facts sufficient to constitute a cause of action. The wording of this complaint might have been better, but we do not deem it fatally obnoxious to the foregoing objection. The action is based upon defendant's negligence, and the rules of pleading appli-

cable did not require a statement of the exact number, quality, weight, and condition of the blankets or other covering provided. The averment that plaintiff "was compelled to sleep on the cold, wet and frozen ground, without anything under him except damp branches of pine or spruce trees, and without sufficient blankets or bedclothes to cover him, and protect him from the cold, whereby plaintiff was taken dangerously sick from such exposure, . . . " is, in our judgment, the allegation of a material ultimate fact. It is considerably strengthened by other averments of the complaint. But, from the language of this allegation alone, it appears that no bunk or bed *of any kind* was furnished; while under that part of it which relates to covering, evidence of such primary facts as the number and quality of the blankets provided would be admissible.

It was not necessary to allege plaintiff's want of knowledge concerning the kind of weather he encountered at the time of contracting the illness. Under the circumstances disclosed, this became an immaterial matter. There was here no acquiescence in the alleged wrongful omission. When plaintiff reached the camp on Alpine Pass, he, of course, became aware of the condition of the weather. He then, also, for the first time, learned the character of the accommodations furnished. But the complaint shows that immediately upon obtaining this information, he protested, and would have quit work, had not defendant promised to have the supply of beds and bedding at once made sufficient. There was thus a clear admission by defendant that the provision made in this direction was inadequate. But notwithstanding this admission, and defendant's duty in the premises, the promise which induced plaintiff to remain was not kept, nor was anything else done to increase his protection from the dangers naturally incident to the exposure.

But it is asserted that the damages or injuries referred to in the complaint are too remote. We accept the rule on this subject as stated by the authorities cited. The damages suffered must be "the actual, natural and approximate result of the wrong committed." Streeter v. Marshall, 4 Colo. 535. "They must be the legitimate sequence of the thing amiss." Cooley, Torts, 68.

That sickness and paralysis may actually, naturally and proximately result, and be a legitimate sequence, from sleeping several consecutive nights at the summit of Alpine Pass, where "snow-storms prevailed almost continuously," on wet and frozen ground, with nothing but damp pine or spruce branches for a bed, and insufficient blankets or other covering, seems to be a reasonable proposition. We certainly cannot, purely as a matter of law, hold the contrary.

Counsel's suggestion that people frequently incur such exposure, and that neither these nor any other serious consequences follow, may be correct. But this fact, if it be a fact, is far from decisive as to the question of liability in cases like the one at bar. The principle above stated

does not declare that the damage or injury *must* have resulted, or even that it must have been anticipated, in the particular case under consideration. On the contrary, it has been well said "that the consequences of negligence are almost invariably surprises." The expression "reasonable expectation," frequently used in this connection, is said to mean "an expectation that some such disaster as that under investigation will occur *on the long run* from a series of such negligences as those with which the defendant is charged." Whart. Neg. §§ 77, 78, and cases cited.

The foregoing suggestions answer all of the points specifically made in argument against the complaint by counsel for defendant in error, and we discover no other objection thereto which is fatal. The judgment of the district court is accordingly reversed, and the cause remanded. *Reversed.*

REGINA *v.* NORRIS.

WORCESTER ASSIZES, 1840.

[*Reported* 9 *Car. & P.* 241.]

THE prisoners were indicted on the 7 & 8 Geo. IV. c. 30, s. 7, for feloniously, unlawfully, and maliciously damaging, with intent to destroy it, a certain steam engine used in the draining and working of a mine; 2d count, for damaging the engine with intent to render it useless.

It appeared that the steam engine was used to bring up coals from one shaft of the mine, and water from another, and that it was stopped and locked up on the evening of the 3d of March, and that the prisoners on that night got into the engine house and set the engine going, and from its having no machinery attached to it, the engine worked with greater velocity, and the wheels were some of them thrown out of cog, so that the engine was damaged to the amount of £10, and would have been injured to a much greater extent, if the mischief had not been discovered and the engine stopped.

GURNEY, B., left it to the jury to say, whether the intent of the prisoners was to destroy the engine, or to render it useless; and held, that, if the prisoners had either of those intents, the case came within the provisions of the statute.

The jury found the prisoners guilty.

LYNN GAS & ELECTRIC CO. *v.* MERIDEN INSURANCE CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1893.

[*Reported* 158 *Mass.* 570.]

KNOWLTON, J. The only exception relied on by the defendants in these cases is that relating to the claim for damage to the machinery used in generating electricity and to the building from a disruption of

the machinery. This machinery was in a part of the building remote from the fire, and none of it was burned. In his charge to the jury the judge stated the theory of the plaintiff as follows: "The plaintiff says the position of the lightning arresters in the vicinity of the fire was such that by reason of the fire in the tower a connection was made between them called a short circuit; that the short circuit resulted in keeping back or in bringing into the dynamo below an increase of electric current that made it more difficult for this armature to revolve than before, and caused a higher power to be exerted upon it, or at least caused greater resistance to the machinery; that this resistance was transmitted to the pulley by which this armature was run, through the belt; that that shock destroyed that pulley; that by the destruction of that pulley the main shaft was disturbed and the succeeding pulleys up to the jack-pulley were ruptured; that by reason of pieces flying from the jack-pulley, or from some other cause, the fly-wheel of the engine was destroyed, the governor broken, and everything crushed; — in a word, that the short circuit in the tower by reason of the fire caused an extra strain upon the belt through the action of electricity, and that caused the damage." The plaintiff contended that the short circuit was produced by the fire, either by means of heat on the horns of the lightning arresters, or by a flame acting as a conductor between the two horns, or in some other way. The jury found that the plaintiff's theory of the cause of the damage was correct, and the question is whether the judge was right in ruling that an injury to the machinery caused in this way was a "loss or damage by fire," within the meaning of the policy.

The subject matter of the insurance was the building, machinery, dynamos, and other electrical fixtures, besides tools, furniture, and supplies used in the business of furnishing electricity for electric lighting. The defendants, when they made their contracts, understood that the building contained a large quantity of electrical machinery, and that electricity would be transmitted from the dynamos, and would be a powerful force in and about the building. They must be presumed to have contemplated such effects as fire might naturally produce in connection with machinery used in generating and transmitting strong currents of electricity.

The subject involves a consideration of the causes to which an effect should be ascribed when several conditions, agencies, or authors contribute to produce an effect. The defendants contend that the application of the principle which is expressed by the maxim, *In jure non remota causa sed proxima spectatur*, relieves them from liability in these cases. It has often been necessary to determine, in trials in court, what is to be deemed the responsible cause which furnishes a foundation for a claim when several agencies and conditions have a share in causing damage, and the best rule that can be formulated is often difficult of application. When it is said that the cause to be

sought is the direct and proximate cause, it is not meant that the cause or agency which is nearest in time or place to the result is necessarily to be chosen. Freeman v. Mercantile Accident Association, 156 Mass. 351. The active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source is the direct and proximate cause referred to in the cases. McDonald v. Snelling, 14 Allen, 290; Perley v. Eastern Railroad, 98 Mass. 414, 419; Gibney v. State, 137 N. Y. 529. In Milwaukee & St. Paul Railway v. Kellogg, 94 U. S. 469, 474, Mr. Justice Strong, who also wrote the opinions in Insurance Co. v. Transportation Co., 12 Wall. 194, and in Western Massachusetts Ins. Co. v. Transportation Co., 12 Wall. 201, which are much relied on by the defendants, used the following language in the opinion of the court: "The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place. 2 Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

If this were an action against one who negligently set the fire in the tower, and thus caused the injury to the machinery, it is clear, on the theory of the plaintiff, that the negligent act of setting the fire would be deemed the active efficient cause of the disruption of the machinery and the consequent injury to the building. It remains to inquire whether there is a different rule in an action on a policy of fire insurance.

Under our statute creating a liability for damages received from defects in highways, it is held that the general rule is so far modified that there can be no recovery unless the defect is the sole cause of the accident; but this doctrine rests on the construction of the statute. Tisdale v. Norton, 8 Met. 388; Marble v. Worcester, 4 Gray, 395; Jenks v. Wilbraham, 11 Gray, 142; McDonald v. Snelling, 14 Allen, 290; Babson v. Rockport, 101 Mass. 93.

In suits brought on policies of fire insurance, it is held that the intention of the defendants must have been to insure against losses where the cause insured against was a means or agency in causing the loss, even though it was entirely due to some other active, efficient cause which made use of it, or set it in motion, if the original efficient cause was not itself made a subject of separate insurance in the contract between the parties. For instance, where the negligent act of the insured, or of anybody else, causes a fire, and so causes damage,

although the negligent act is the direct, proximate cause of the damage, through the fire, which was the passive agency, the insurer is held liable for a loss caused by the fire. Johnson *v.* Berkshire Ins. Co., 4 Allen, 388; Walker *v.* Maitland, 5 B. & Ald. 171; Waters *v.* Merchants' Louisville Ins. Co., 11 Pet. 213; Peters *v.* Warren Ins. Co., 14 Pet. 99; General Ins. Co. *v.* Sherwood, 14 How. 351; Insurance Co. *v.* Tweed, 7 Wall. 44. This is the only particular in which the rule in regard to remote and proximate causes is applied differently in actions on fire insurance policies from the application of it in other actions. A failure sometimes to recognize this rule as standing on independent grounds and established to carry out the intention of the parties to contracts of insurance, has led to confusion of statement in some of the cases. The difficulty in applying the general rule in complicated cases has made the interpretation of some of the decisions doubtful; but on principle, and by the weight of authority in many well-considered cases, we think it clear that, apart from the single exception above stated, the question, What is a cause which creates a liability? is to be determined in the same way in actions on policies of fire insurance as in other actions. Scripture *v.* Lowell Ins. Co., 10 Cush. 356; New York & Boston Despatch Express Co. *v.* Traders & Mechanics' Ins. Co., 132 Mass. 377; St. John *v.* American Ins. Co., 1 Kernan, 516; General Ins. Co. *v.* Sherwood, 14 How. 351; Insurance Co. *v.* Tweed, 7 Wall. 44; Waters *v.* Merchants' Louisville Ins. Co., 11 Pet. 213, 225; Livie *v.* Janson, 12 East, 648; Ionides *v.* Universal Ins. Co., 14 C. B. (N. S.) 259; Transatlantic Ins. Co. *v.* Dorsey, 56 Md. 70; United Ins. Co. *v.* Foote, 22 Ohio St. 340.

In the present case, the electricity was one of the forces of nature, — a passive agent working under natural laws,— whose existence was known when the insurance policies were issued. Upon the theory adopted by the jury, the fire worked through agencies in the building, the atmosphere, the metallic machinery, electricity, and other things; and working precisely as the defendants would have expected it to work if they had thoroughly understood the situation and the laws applicable to the existing conditions, it put a great strain on the machinery and did great damage. No new cause acting from an independent source intervened. The fire was the direct and proximate cause of the damage according to the meaning of the words "direct and proximate cause," as interpreted by the best authorities. The instructions to the jury were full, clear, and correct, and the defendants' requests for instructions were rightly refused.

Exceptions overruled.[1]

[1] See also Phillips *v.* New York C. & H. R. R. R., 127 N. Y. 657, 27 N. E. 978. — Ed.

BUNTING v. HOGSETT.

SUPREME COURT OF PENNSYLVANIA, 1891.

[*Reported* 139 *Pa.* 363.]

ON October 13, 1883, Mr. and Mrs. Bunting were passengers upon a train proceeding upon the Southwest Pennsylvania railroad toward Uniontown. That railroad was crossed, at two points, near Lemont furnace, in Fayette county, by a private coke railroad, owned and operated by the defendant. After making the first crossing, the coke road described a semicircle and then re-crossed the track of the railroad company, the two intersections being 646 feet apart. When the train in which the plaintiffs were traveling approached the first crossing, a "dinkey engine" of the defendant, pushing a coke car, was upon the semicircular part of the defendant's track, backing toward the same crossing. The engineer of the dinkey engine was inexperienced, and had no watch or time card. The passenger train was hidden from his view by a heap of slag and cinder, dumped upon the defendant's property, until it arrived at the crossing, and until then the defendant's engineer was ignorant of its approach. The engineer of the passenger train did not see the dinkey engine until the same time. The testimony was conflicting as to whether the whistle of the passenger engine was sounded before it reached the crossing, and also as to whether the defendant's engineer whistled.

Upon seeing the passenger train, the defendant's engineer reversed his engine, but was unable to stop it, and the coke car pushed by it collided with the platform of the rear coach of the passenger train. There was testimony tending to show that this collision caused the rear truck of the coach to leave the rails, though this fact was in dispute. It was undisputed, however, that this truck was on the rails when the train was afterwards stopped. When the collision occurred, a brakeman on the passenger train pulled the cord operating the air brakes of the train, and the engineer put on the air from the engine. The result was to bring the train to a full stop, on the second crossing of the defendant's road. There was testimony tending to show that the use of the automatic cord rendered the release of the train from the brakes a matter of greater difficulty, requiring more time than if the engineer alone had operated the brakes.

Before the occurrence of the collision, the defendant's engineer and fireman, on the coke road, being in fear of their lives, jumped from the dinkey engine, the engineer having first shut off steam. The throttle of that engine became re-opened, presumably as the result of the jarring incident to the collision, and the engine started back along the semicircular piece of track toward the second crossing. The

defendant's engineer, being unable to get upon his engine again, motioned to the engineer of the passenger train, which had stopped and was standing upon that crossing, to pull away from it; but this the latter was unable to do in time, and the dinkey engine, running round the arc formed by defendant's track, struck the middle coach of the passenger train in which the plaintiffs were sitting. In this second collision, the plaintiffs received the injuries for which their respective actions were brought.[1]

CLARK, J. The defendant, Robert Hogsett, is the owner of the Lemont furnace, on the line of the Southwest Pennsylvania railroad, and the plaintiff, who, on the thirteenth of October, 1883, was a passenger upon one of the railroad trains, brings this suit to recover damages for a personal injury, received through the alleged negligence of the defendant's employees. It appears that a railroad track was used in connection with the furnace, and that what is called a dinkey engine was operated thereon, in furnishing supplies of stock, ore, and coke to the furnace. The furnace track, in running out from the furnace to the coke ovens, forms, as it were, the arc of a circle, and the railroad track, crossing the furnace track twice, subtends the arc as a chord.

The collision which occurred at the first crossing, was caused by the culpable negligence of the defendant's engineer; this fact is conclusively established by the verdict of the jury, and in the determination of the questions of law raised upon the assignments of error, this fact must necessarily be assumed. It is unnecessary, therefore, to refer to the evidence bearing upon that question. The appellant's contention is, however, that, as the plaintiff's injuries were not received in that collision, but in the collision which subsequently occurred at the other extremity of the chord, the negligence of the engineer, under the circumstances, cannot be regarded as the proximate, but as the remote cause of the injury. Ordinarily, the question of proximate cause is for the jury; but, where the facts are not in dispute, the determination of that question is for the court: West Mahanoy Tp. *v.* Watson, 112 Pa. 574; s. c. 116 Pa. 344. Some reference to the undisputed facts, therefore, is necessary to a complete understanding of the question thus raised.

It is conceded that in the first collision, although no one was injured, the rear truck of the rear coach of the passenger train was derailed. The brakeman pulled the automatic cord which operates the air brakes. The engineer put on the air from the engine, and, the truck having regained the track, the train, which consisted of three cars, came to a full stop, with the middle car standing upon the second crossing. The engineer of the dinkey says that, about the time of, or immediately before the collision, he reversed his engine, shut off the steam, and fearing that they would be crushed, both the engineer and the fireman jumped from

[1] Part of the case is omitted. — ED.

it to the ground. By some means, however, presumably by the jar of the collision, the throttle was re-opened, and the dinkey at once started with some speed around the arc to the second crossing, where it came in collision with the middle coach, in which the plaintiff was riding. The injuries complained of were received in this second collision. The appellant's contention is that the throttle having been closed before Leehan, the engineer, left the dinkey, the second collision, under all the circumstances, could not have been foreseen by him, as the natural and probable consequence of his conduct, and that, being in fear of his life, he had a right to quit the engine for a place of safety. It may be, perhaps, that the engineer and fireman, being under actual apprehension of great bodily harm, were, in any criminal aspect of the case, justified in leaping from the engine to save themselves, even if in so doing they should put in jeopardy the lives of others. But, assuming this to be so, it must be remembered that it was their own negligence which put them in fear of their lives, and constrained them to leap from the engine and submit it, without control, to the consequences of the collision. They will be justified, perhaps, as we have said, in saving themselves, but it does not follow that either they, or their employer, would not be held for the negligent act which not only put them in peril but resulted in personal injury to the plaintiff.

It is true, as the appellant contends, that the injury must be the natural and proximate conseqence of the negligence,— a consequence likely to flow from the negligent act. The engineer would be held to have foreseen whatever consequences might ensue from his negligence without the intervention of some other independent agency, and both his employer and himself would be held for what might, in the nature of things, occur in consequence of that negligence, although, in advance, the actual result might have seemed improbable: Oil City Gas Co. *v.* Robinson, 99 Pa. 6. We do not know that the throttle was opened by the jar of the collision, only from the fact that it was liable to be so, and the engineer will be presumed to have foreseen what was liable to occur. The inquiry must always be whether there was any intermediate cause, disconnected from the primary fault and self-operating, which produced the injury: Milwaukee etc. Ry. Co. *v.* Kellogg, 94 U. S. 469. But no intermediate cause, disconnected with the primary fault and self-operating, existed in this case, to affect the question of the defendant's liability; it was the engineer's negligence that caused the first collision, and what occurred in consequence of this collision was not broken by the intervention of any independent agent, whatever; the first collision derailed the truck, and at the same instant opened the throttle and turned loose the destructive agency which inflicted the injuries complained of. The negligence of the defendant's engineer was the natural, primary, and proximate cause of the entire occurrence.

REGINA v. BENNETT.

CROWN CASE RESERVED. 1858.

[*Reported* 28 *L. J. M.* C. 27.]

CASE stated by WILLES, J. The defendant was convicted of the manslaughter of Sarah Williams. The defendant was a dealer in fireworks, and he caused fireworks to be made in his shop, contrary to the provisions of 9 & 10 Will. 3. c. 7, s. 1. While the defendant was absent from his shop a fire broke out, either by pure accident or by the negligence of his servant, and a rocket was caused to fly across the street. The rocket set fire to the house in which the deceased was at the time, and the deceased was thereby burned to death. It was objected that the death of the deceased was not the direct and immediate result of any wrong or omission on the part of the defendant. WILLES, J., however, overruled the objection, holding that the prisoner was guilty of a misdemeanor in doing an act with intent to do what was forbidden by the statute; and that as the fire was occasioned by such misdemeanor, and without it would not have taken place, or could not have been of such a character as to cause the death of the deceased, which otherwise would not have taken place, a case was made out.[1]

COCKBURN, C. J. — The prisoner kept a quantity of fireworks in his house, but that alone did not cause the fire by which the death was occasioned. It was the superadded negligence of some one else that caused it. Had the death proceeded from the natural consequence of this unlawful keeping of the fireworks, as, for instance, if from the prisoner's negligent keeping of them a rocket had gone off in spontaneous combustion, and so caused the death, the conviction might, I think, have been maintained. But here the death was caused by the act of the defendant *plus* the act of some one else.

WILLES, J. Having given very full consideration to this case since the trial, I concur in the opinion of the Chief Justice, that the intervening of the negligent act of the servant makes the death too remotely caused by the illegal act of the prisoner in keeping the fireworks, and so disconnects it from his act, and that the conviction cannot be supported.

The other Judges concurred. *Conviction quashed.*

[1] This short statement of the case is abridged from the statement of WILLES, J. — ED.

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WOOD v. PENNSYLVANIA RAILROAD CO.

SUPREME COURT OF PENNSYLVANIA, 1896.

[*Reported* 177 *Pa.* 306.]

DEAN, J. We take the facts as stated by the court below, as follows: "On the 26th of October, 1893, the plaintiff, having bought a return ticket, went as a passenger upon the railroad of the defendant company from Frankford to Holmesburg. After spending the day there attending to some matters of business, he concluded to come back upon a way train due at Holmesburg at five minutes after six in the evening. While waiting for this train, the plaintiff stood on the platform of the station, which was on the north side of the tracks, at the eastern end of the platform with his back against the wall at the corner. To the eastward of the station, a street crosses the railroad at grade. How far this crossing is from the station does not appear from the evidence. It was not so far away, however, but that persons on the platform could see objects at the crossing. For at least one hundred and fifty yards to the eastward of the crossing, the railroad is straight, and then curves to the right. About 6 o'clock, an express train coming from the eastward upon the north track passed the station, and the plaintiff, while standing in the position described, was struck upon the leg by what proved to be the dead body of a woman, and was injured. The headlight of the approaching locomotive disclosed to one of the witnesses who stood on the platform two women in front of the train at the street crossing, going from the south to the north side of the tracks. One succeeded in getting across in safety, and the other was struck just about as she reached the north rail. How the woman came to be upon the track, there is nothing in the evidence to show. There was evidence that no bell was rung or whistle blown upon the train which struck the woman before it came to the crossing, and some evidence that it was running at the rate of from fifty to sixty miles an hour. Upon this state of facts, the trial judge entered a nonsuit."

The court in banc having afterwards refused to take off the nonsuit, we have this appeal.

Was the negligence of defendant the proximate cause of plaintiff's injury? Judge Pennypacker, delivering the opinion of a majority of the court below, concluded it was not, and refused to take off the non-suit. Applying the rule in Hoag v. Railroad Co., 85 Pa. 293, to these facts, the question on which the case turns is: "Was the injury the natural and probable consequence of the negligence,— such a consequence as under the surrounding circumstances might and ought to have been foreseen by the wrongdoer as likely to flow from his act."

As concerns the situation of plaintiff at the time of his injury, and the relation of that fact to the cause, whether near or remote, we do not consider it important. He was where he had a right to be, on the platform of the station; that he had purchased a ticket for passage on defendant's road and was waiting on its platform for his train has no particular bearing on the question. The duty of defendant to him at that time was to provide a platform and station, safe structures, for him and others who desired to travel. In this particular, its duty was performed; the injury is not in the remotest degree attributable to the platform or the station. It is sufficient to say, when there he was not a trespasser on defendant's property, and therefore his action does not fail for that reason; but he is in no more favorable situation as a suitor, than if he had been walking alongside the railroad, on the public highway, or at any other place where he had a right to be.

The rule quoted in Hoag *v.* Railroad, *supra*, is in substance the conclusion of Lord Bacon, and the one given in Broom's Legal Maxims. It is not only the well settled rule of this state, but is, generally, that of the United States. Professor Jaggard, in his valuable work on torts, after a reference to very many of the cases decided in a large number of the states, among them Hoag *v.* R. R. Co., comes to this conclusion: "It is admitted that the rule is difficult of application. But it is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is a proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances:" Jaggard on Torts, chap. v. Judge Cooley states the rule thus: "If the original act was wrongful, and would, naturally, according to the ordinary course of events, prove injurious to some others, and result, and does actually result, in injury, through the intervention of other causes not wrongful, the injury shall be referred to the wrongful cause, passing through those which were innocent": Cooley on Torts, 69. This, also, is in substance the rule of Hoag *v.* Railroad Co. All the speculations and refinements of the philosophers on the exact relations of cause and effect help us very little in the determination of rules of social conduct. The juridical cause, in such a case, as we have held over and over, is best ascertained in the practical affairs of life by the application to the facts of the rule in Hoag *v.* Railroad Co.

Adopting that rule as the test of defendant's liability, how do we determine the natural and probable consequences which must be foreseen, of this act? We answer, in this and all like cases, from common experience and observation. The probable consequence of crossing a railroad in front of a near and approaching train is death or serious injury; therefore, acting from an impulse to self-preservation, or on the reflection that prompts to self-preservation, we are deterred from crossing. Our conduct is controlled by the natural and probable

consequence of what our experience enables us to foresee. True, a small number of those who have occasion to cross railroads are reckless, and either blind to or disregardful of consequences, cross and are injured, killed or barely escape; but this recklessness of the very few in no degree disproves the foreseeableness of the consequences by mankind generally. Again, the competent railroad engineer knows, from his own experience and that of others in like employment, that to approach a grade highway crossing with a rapidly moving train without warning is dangerous to the lives and limbs of the public using the crossing; he knows death and injury are the probable consequences of his neglect of duty, therefore he gives warning. But does any one believe the natural and probable consequence of standing fifty feet from a crossing to the one side of a railroad, when a train is approaching, either with or without warning, is death or injury? Do not the most prudent, as well as the public generally, all over the land, do just this thing every day, without fear of danger? The crowded platforms and grounds of railroad stations, generally located at crossings, alongside of approaching, departing and swiftly passing trains, prove that the public, from experience and observation, do not, in that situation, foresee any danger from trains. They are there, because, in their judgment, although it is possible a train may strike an object, animate or inanimate, on the track and hurl it against them, such a consequence is so highly improbable that it suggests no sense of danger; they feel as secure as if in their homes; to them it is no more probable than that a train at that point will jump the track and run over them. If such a consequence as here resulted was not natural, probable or foreseeable to anybody else, should defendant, under the rule laid down in Hoag *v.* Railroad Co. be chargeable with the consequence? Clearly, it was not the natural and probable consequence of its neglect to give warning, and therefore was not one which it was bound to foresee. The injury, at most, was remotely possible, as distinguished from the natural and probable consequence of the neglect to give warning. As is said in Railroad Co. *v.* Trich, 117 Pa. 399: "Responsibility does not extend to every consequence which may possibly result from negligence."

What we have said thus far is on the assumption, the accident was caused solely by the negligence of defendant, or by the concurring negligence of defendant and the one killed going upon the track with a locomotive in full view. This being an action by an innocent third person, he cannot be deprived of his remedy because his injury resulted from the concurrent negligence of two others. He fails because his injury was a consequence so remote that defendant could not reasonably foresee it.[1]

[1] The remainder of the opinion discusses the alleged negligence of the defendant.—Ed.

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HILL v. WINSOR.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1875.

[*Reported* 118 *Mass.* 251.]

TORT against the owners of the steam-tug Argus for personal injuries sustained by the plaintiff, through the alleged negligence of those in charge of the tug in causing her to strike violently against the fender of Warren Bridge, a bridge between Boston and Charlestown. Trial in the Superior Court, before Bacon, J., who allowed the following bill of exceptions:

The plaintiff's evidence tended to show that the plaintiff, with other shipwrights and bridge builders, were, on December 12, 1872, employed by those in charge of Warren Bridge to repair its fender; that this fender was on the upper side of it about eighteen feet from the main structure, and extended from the draw to the wharf on the Charlestown side; that this fender, when perfect and in good order, consisted of large oak piles about fifteen inches in diameter at the top and about twelve feet apart, driven perpendicularly into the bed of the river, and two driven at a slight incline therefrom, trending down the river, and fastened to the lower part of the upright piles, and one trending up the river, whose top was fitted to, or intended to fit, the top of the upright pile, and to be fastened to it and to the cap thereon by spikes, the two piles trending down the river being of less length and diameter than the others; that this cap, consisting of yellow pine timber fifteen inches square, extended along the whole row of piles, resting upon the tops of the same; that on said day a foreman, with six workmen, including the plaintiff, were employed in repairing the fender; that they worked in three parties, each party standing on planks sustained by spikes driven into the upper spurshores or inclined piles of the fender, and about nine or ten feet above the water of the river; that it was then half tide, the river deep, and the ebb-tide setting down at the rate of three to four miles per hour; that the men were standing on the planks, and working in pairs fitting the heads of the upper inclined pile or spurshore to the cap and to the tops of the upright piles; that two of these men were towards the Charlestown side from the plaintiff, and were working at a pile about thirty feet east from the spurshore where several of the defendants' witnesses testified that the tug struck; that the plaintiff was at work, standing alone on a plank about sixty feet east from said spurshore, his companion having left him a short time previously; that, in order to fit his spurshore to the pile and cap, he had put in a brace about twelve inches long and three inches in diameter, to keep the spurshore and pile apart while he was at work; that two more workmen were fitting a spurshore about sixty feet east of the plaintiff, and the foreman of the work was on the bridge; that a portion of the spurshores were not completed and

fastened to the caps; that a few minutes before the tug struck against the spurshore, she had come down to the entrance of the draw from some point above the bridge. The defendants' evidence showed that their vessel was about sixty-five feet in length; that while at the draw the master of the tug was requested to tow down a raft lying near the Fitchburg Railroad Bridge, and, finding it difficult or impossible to turn around, he backed his tug towards the Charlestown shore, but was not able to reach the raft, as the tide swept him down towards the fender of the Warren Bridge; that, as he backed over, he passed near the fender, and was seen by the workmen thereon who were visible from his deck.

The plaintiff's evidence further tended to show that when the master of the tug was nearly across the river, but could not reach the raft, and had drifted within a short distance of the fender, he started the tug with a view to return to the draw, and after running towards Boston, about her length, at the rate of three to four miles an hour, struck one of the upper spurshores of the fender at the point above described; that the blow jarred the fender for the distance of ninety feet; that the workmen, on the planks hung over the river, as soon as they heard the tug and saw it coming, sprung from their planks to reach the top of the fender, and all reached the cap except the plaintiff, who testified that, as he was at work, the first he knew he heard a puffing noise coming along, and he turned his head and looked, and saw the boat coming, and just as he threw his hands over his head to grab at the pile, so as to jump upon the cap, and just as he grabbed the top of the pile, she struck about three piles from where he was, and the moment she struck there was a jar that jarred the whole thing, and knocked his brace out, and the piles came right together as quick as a flash, and caught his fingers between the pile and the cap, and his knee ran in between the two piles below the cap, and there he was fast; that he never heard or saw the boat until he heard the puffing noise, and looked round and saw her coming; that after she first struck she came passing along, striking one pile and the other; that she went right along and struck the pile he was fast in, and she ran her whole length right up hard against it, and passed right on until she got one or two piles by him; that he was thus seriously injured.[1]

COLT, J. In actions of this description, the questions whether the plaintiff was himself in the exercise of due care, and the defendants' act negligent, whether the injury suffered was due to that act, as well as the amount of damage to the plaintiff, are, as a general rule, practical questions of fact to be settled by the knowledge and experience of the jury. The defendants' liability depends upon circumstances which, as the cases arise, are of infinite variety and combination. If there is any evidence upon which the jury may legally found a verdict for the plaintiff, that verdict cannot be disturbed on exceptions as matter of

[1] The remainder of the testimony and part of the opinion are omitted. — ED.

law, unless there has been some error in the conduct of the trial, or the judge has failed to state the true test of liability in his instructions as applied to the facts disclosed.

Under the instructions given in the present case, the jury must have found that the injury of the plaintiff was caused by neglect or want of ordinary care on the part of those who, as agents and servants of the defendants, had charge of the tug-boat; and that this negligence consisted in not using such care in its navigation and management as persons of ordinary prudence would use under circumstances of like exposure and danger. They must have also found that the plaintiff was himself in the exercise of due care in attempting to escape the peril to which he was exposed by the defendants' conduct, and that his injury was therefore due solely to the defendants' negligence. The evidence reported justifies these findings. The structure upon which the plaintiff was at work was imperfect and out of repair. Its condition at the time, the plaintiff's exposed position upon it, and the knowledge of that exposure which those in charge of the boat had, or in the exercise of due care might have had, were elements affecting the question of the defendants' negligence to which the attention of the jury was especially called. It cannot be said, as matter of law, that the jury might not properly find it obviously probable that injury in some form would be caused to those who were at work on the fender by the act of the defendants in running against it. This constitutes negligence, and it is not necessary that injury in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been a natural and probable consequence. Lane v. Atlantic Works, 111 Mass. 136, and cases cited.

RIGDON v. TEMPLE WATER WORKS CO.

COURT OF CIVIL APPEALS, TEXAS, 1895.

[*Reported* 11 *Tex. Civ. App.* 542.]

FISHER, C. J. Mary Rigdon, the wife of O. T. Rigdon, deceased, in her own behalf and that of Ethel and Ora Frank Rigdon, the minor children of herself and deceased husband, sued the appellee in the form and manner as appears from her petition, as follows:

"That the Temple Water Works Company, during the year 1890, and prior to the 25th day of October, 1890, caused to be erected a water tower, in Temple, Texas, for the purpose of storing water therein; said water tower being about twenty feet in diameter and about one hundred and fifty feet in height. That said water tower was badly planned, the height being too great for the diameter, the same being from this defect liable to fall. That said water tower was contracted to be constructed of material which was not sufficiently strong, and in a manner of workmanship which would not withstand the weight

of its foundation and the pressure on the sides that would be necessary to hold the quantity of water that would be contained therein when full; that said water tower was constructed by careless and unskilled workmen under the supervision of W. E. Thomas and the Temple Water Works Company, which defendants well knew as the same was being constructed; that said water tower was constructed of poor, inferior and insufficient material of rock and cement and mortar in the foundation, and steel and iron and rivets on its sides, which defendants well knew at the time of and as the same was being constructed.

"And plaintiffs allege that by reason of the defects aforesaid, at 3 o'clock A. M. of October 25, 1891, said water tower then being filled with water, and containing about 275,000 gallons, fell over and threw said water out, which rushed in a torrent upon the home of O. T. Rigdon and your petitioners, capsizing and crushing the same and throwing a burning lamp filled with oil upon one O. T. Rigdon, the oil being spilled upon his clothing and set afire from the lighted lamp, by which means said O. T. Rigdon was fatally burned, and from the effects of which he that day died also; and the goods and effects of the said O. T. Rigdon, your petitioner, consisting of clothing, furniture and other personal property of the value of five hundred ($500) dollars, were totally destroyed by crushing and by fire, the effect of water resulting from the insufficient workmanship and material used in the construction of said water tower." [1]

The damages alleged are not speculative or remote, and it is shown that they proximately resulted from the negligence charged. The original negligence was the faulty construction of the water tower. The explosion of the lamp and the ignition of the oil was the proximate result of the fall of the tower. This effect is traceable to the original cause, which is found to be the negligence of appellee in erecting the tower. Railway *v.* Mussette, 86 Tex. 710. . . .

THE LORDS BAILIFF-JURATS OF ROMNEY MARSH *v.* THE CORPORATION OF THE TRINITY HOUSE.

COURT OF EXCHEQUER, 1870.

[*Reported L. R. 5 Ex.* 204.]

SPECIAL CASE stated in an action for negligence tried before Cockburn, C. J., at Maidstone, on the 10th of March, 1869, in which a verdict was found for the plaintiffs for 93*l.*, subject to the opinion of the Court on a special case.

The first count of the declaration charged the defendants with unskilful and negligent navigation of their ship by their servants, whereby the same was wrecked, and ran foul of and injured a sea wall of the plaintiffs'.[2]

[1] The remainder of the petition and other portions of the opinion are omitted. — ED.

[2] Only so much of the case as discusses this count is given. — ED.

The facts stated in the case were as follows. On the 30th of November, 1867, the defendants' pilot cutter Queen, through the negligence of her captain and crew, struck upon a shoal about three-quarters of a mile out from the Dymchurch wall, a sea wall owned and repaired by the plaintiffs. It was then blowing hard, and there was a flood tide; and in consequence, after the vessel struck, the captain and crew lost all control over her, and she gradually drifted towards the shore, and was at last driven against the wall. If the weather had been moderate and the state of the tide different, this might have been prevented, but in the then state of the weather and tide it was impossible to prevent it. After the ship struck the ground, some of the crew escaped in a boat, and the captain and the rest of the crew were rescued from the cutter just before she struck the wall.

KELLY, C. B. The question in this case is, whether the injury to the plaintiffs' wall was so caused by the negligence of the defendants as to make the defendants liable within the rule of law applicable to such cases.

The defendants' vessel, by the negligence of the captain and crew, grounded upon a shoal or sand-bank within three-quarters of a mile of the wall of the plaintiffs', the immediate effect of which was that the vessel became unmanageable and beyond the control of the crew; and as at the time a high wind was blowing and the tide flowing towards the shore, the vessel was driven and carried with great violence against the wall, and so effected the injury in question.

The rule of law is, that negligence to render the defendants liable must be the *causa causans*, or the proximate cause of the injury, and not merely a *causa sine qua non*.

I think that it was so in the present case. The immediate effect of the negligence was to put the vessel into such a condition that it must necessarily and inevitably be impelled in whatever direction the wind and tide were giving at the moment to the sea, and this was directly upon and towards the plaintiffs' wall. The case, therefore, appears to me to be the same as if the ship had been lying at anchor, with the tide flowing rapidly towards a rock, and the defendants had, by some negligence, broken the chain and set free the ship, in consequence of which it had at once and immediately been carried by the tide with great force and violence against the rock, and had become a wreck. Would not the wreck of the ship have been caused by the negligence which broke the chain? I think that it would, and that such a case and the case before the court are the same; that the negligence of the crew, the servants of the defendants, was thus the immediate cause of the ship being driven against the wall of the plaintiffs, and that the plaintiffs are therefore entitled to recover. My Brother Pigott concurs in this judgment, and my Brother Martin, though entertaining some doubt upon the case, does not dissent.

Judgment for the plaintiffs.

THE G. R. BOOTH.

SUPREME COURT OF THE UNITED STATES, 1898.

[*Reported* 171 *U. S.* 450.]

GRAY, J. This was a libel against the steamship G. R. Booth, for damage done to sugar, part of her cargo, under the following circumstances: Another part of the cargo consisted of twenty cases of detonators, being copper caps packed with fulminate of mercury for exploding dynamite or gun-cotton. While she was being unladen at the dock in her port of destination, one of the cases of detonators exploded, purely by accident, and without any fault or negligence on the part of any one engaged in carrying or discharging the cargo. The explosion made a large hole in the side of the ship, through which the sea water rapidly entered the hold, and greatly damaged the sugar.

The bill of lading of the sugar provides that "the ship or carrier shall not be liable for loss or damage occasioned by the perils of the sea or other waters," or "by collision, stranding or other accidents of navigation, of whatsoever kind."

The question certified by the Circuit Court of Appeals to this court is whether the damage to the sugar is within these exceptions in the bill of lading.

The case turns upon the question whether the damage to the sugar by the sea water which entered the ship through the hole made in her side by the explosion, without her fault, was "occasioned by the perils of the sea"; or, in other words, whether it is the explosion, or a peril of the sea, that is to be considered as the proximate cause of the damage, according to the familiar maxim *causa proxima non remota spectatur*.

The many authorities bearing upon this point, fully cited and discussed in the learned arguments at the bar, have been carefully examined. But only a few of them need to be referred to, because judgments heretofore delivered by this court afford sufficient guides for the decision of this case.[1]

In the case at bar, the explosion of the case of detonators, besides doing other damage, burst open the side of the ship below the water line, and the sea water rapidly flowed in through the opening made

[1] The learned judge here discussed the following cases: U. S. *v.* Hall, 6 Cranch, 171; Waters *v.* Merchants' Ins. Co., 11 Pet. 213; Insurance Co. *v.* Tweed, 7 Wall. 44; Insurance Co. *v.* Boon, 95 U. S. 117; Insurance Co. *v.* Transportation Co., 12 Wall. 194; Milwaukee & St. Paul Ry. *v.* Kellogg, 94 U. S. 469; The Mohawk, 8 Wall. 153; The Portsmouth, 9 Wall. 682; Phoenix Ins. Co. *v.* Erie Transportation Co., 117 U. S. 312; Liverpool Steam Ins. Co. *v.* Phoenix Ins. Co., 129 U. S. 397; Compania La Flecha *v.* Brauer, 168 U. S. 104; The Xantho, 12 App. Cas. 503.— ED.

by the explosion, and injured the plaintiff's sugar. The explosion, in consequence of which, and through the hole made by which, the water immediately entered the ship, must be considered as the predominant, the efficient, the proximate, the responsible cause of the damage to the sugar, according to each of the tests laid down in the judgments of this court, above referred to. The damage to the sugar was an effect which proceeded inevitably, and of absolute necessity, from the explosion, and must therefore be ascribed to that cause. The explosion concurred, as the efficient agent, with the water, at the instant when the water entered the ship. The inflow of the water, seeking a level by the mere force of gravitation, was not a new and independent cause but was a necessary and instantaneous result and effect of the bursting open of the ship's side by the explosion. There being two concurrent causes of the damage — the explosion of the detonators, and the inflow of the water — without any appreciable interval of time, or any possibility of distinguishing the amount of damage done by each, the explosion, as the cause which set the water in motion, and gave it its efficiency for harm at the time of the disaster, must be regarded as the predominant cause. It was the primary and efficient cause, the one that necessarily set the force of the water in operation; it was the superior or controlling agency, of which the water was the incident or instrument. The inflow of the sea water was not an intermediate cause, disconnected from the primary cause, and self-operating; it was not a new and independent cause of damage; but, on the contrary, it was an incident, a necessary incident and consequence, of the explosion; and it was one of a continuous chain of events brought into being by the explosion — events so linked together as to form one continuous whole.

The damage was not owing to any violent action of winds or waves, or to the ship coming against a rock or shoal or other external object; but it was owing to an explosion within the ship, and arising out of the nature of the cargo, which cannot be considered, either in common understanding, or according to the judicial precedents, as a peril of the sea.

As was observed by this court in Insurance Co. *v.* Boon, above cited, "Often, in case of a fire, much of the destruction is caused by water applied in efforts to extinguish the flames; yet, it is not doubted, all that destruction is caused by the fire, and insurers against fire are liable for it." 95 U. S. 131. If damage done by water thrown on by human agency to put out a fire is considered a direct consequence of the fire, surely damage done by water entering instantly, by the mere force of gravitation, through a hole made by an explosion of part of the cargo, must be considered as a direct consequence of the explosion.

Upon principle and authority, therefore, our conclusion is that the explosion, and not the sea water, was the proximate cause of the

damage to the sugar, and that this damage was not occasioned by the perils of the sea, within the exceptions in the bill of lading.

Nor can the damage to the sugar, attributable, not to a peril of the sea, but to the explosion of part of the cargo after the ship had ended her voyage, and had been finally and intentionally moored at the dock, there to remain until her cargo was taken out of her, be considered as "occasioned by accidents of navigation." Canada Shipping Co. *v.* British Shipowners' Association, 23 Q. B. D. 342; The Accomac, 15 Prob. Div. 208; Thames & Mersey Ins. Co. *v.* Hamilton, 12 App. Cas. 484; The Mohawk, above cited.

Much reliance was placed by the appellee upon a recent English case, in which the House of Lords, reversing the decision of Lord Esher and Lords Justices Bowen and Fry in the Court of Appeal, and restoring the judgment of Lord Justice Lopes in the Queen's Bench Division, held that damage to goods by sea water which, without any neglect or default on the part of the shipowners or their servants, found its way into the hold of a steamship through a hole which had been gnawed by rats in a leaden pipe connected with the bath room of the vessel, was within the exception of "dangers or accidents of the seas" in a bill of lading. Hamilton *v.* Pandorf, 12 App. Cas. 518; 17 Q. B. D. 670; 16 Q. B. D. 629. There is nothing in the report of any stage of that case to show that the sea water entered the ship immediately upon the gnawing by the rats of the hole in the pipe; and any such inference would be inconsistent with one of the opinions delivered in the House of Lords, in which Lord Fitzgerald said: "The remote cause was in a certain sense the action of the rats on the lead pipe; but the immediate cause of the damage was the irruption of sea water from time to time through the injured pipe, caused by the rolling of the ship as she proceeded on her voyage." 12 App. Cas. 528. However that may have been, that case differs so much in its facts from the case now before us, that it is unnecessary to consider it more particularly.

Question certified answered in the negative.[1]

RYAN *v.* NEW YORK CENTRAL RAILROAD CO.

COURT OF APPEALS OF NEW YORK, 1866.

[*Reported* 35 *N. Y.* 210.]

HUNT, J. On the 15th day of July, 1854, in the city of Syracuse, the defendant, by the careless management, or through the insufficient condition, of one of its engines, set fire to its woodshed, and a large quantity of wood therein. The plaintiff's house, situated at a distance of one hundred and thirty feet from the shed, soon took fire from the

[1] See also Neale *v.* New York Steam Co., 147 N. Y. App. Div. 725, 132 N. Y. Supp. 71.— ED.

heat and sparks, and was entirely consumed, notwithstanding diligent efforts were made to save it. A number of other houses were also burned by the spreading of the fire. The plaintiff brings this action to recover from the railroad company the value of his building thus destroyed. The judge at the Circuit non-suited the plaintiff, and the General Term of the fifth district affirmed the judgment.

The question may be thus stated: A house in a populous city takes fire, through the negligence of the owner or his servant; the flames extend to and destroy an adjacent building: Is the owner of the first building liable to the second owner for the damage sustained by such burning?

It is a general principle that every person is liable for the consequences of his own acts. He is thus liable in damages for the proximate results of his own acts, but not for remote damages. It is not easy at all times to determine what are proximate and what are remote damages. In Thomas *v.* Winchester (2 Seld. 408), Judge Ruggles defines the damages for which a party is liable, as those which are the natural or necessary consequences of his acts. Thus, the owner of a loaded gun, who puts it in the hands of a child, by whose indiscretion it is discharged, is liable for the injury sustained by a third person from such discharge. (5 Maule & Sel. 198.) The injury is a natural and ordinary result of the folly of placing a loaded gun in the hands of one ignorant of the manner of using it, and incapable of appreciating its effects. The owner of a horse and cart, who leaves them unattended in the street, is liable for an injury done to a person or his property, by the running away of the horse (Lynch *v.* Nurdin, 1 Adol. & Ellis, N. S., 29; Illidge *v.* Goodin, 5 Car. & P. 190), for the same reason. The injury is the natural result of the negligence. If the party thus injured had, however, by the delay or confinement from his injury, been prevented from completing a valuable contract, from which he expected to make large profits, he could not recover such expected profits from the negligent party, in the cases supposed. Such damages would not be the necessary or natural consequences, nor the results ordinarily to be anticipated, from the negligence committed. (6 Hill, 522; 13 Wend. 601; 3 E. D. Smith, 144.) So if an engineer upon a steamboat or locomotive, in passing the house of A., so carelessly manages its machinery that the coals and sparks from its fires fall upon and consume the house of A., the railroad company or the steamboat proprietors are liable to pay the value of the property thus destroyed. (Field *v.* N. Y. Central R. R., 32 N. Y. 339.) Thus far the law is settled and the principle is apparent. If, however, the fire communicates from the house of A. to that of B., and that is destroyed, is the negligent party liable for his loss? And if it spreads thence to the house of C., and thence to the house of D., and thence consecutively through the other houses, until it reaches and consumes the house of Z., is the party liable to pay the damages sustained by these twenty-

four sufferers? The counsel for the plaintiff does not distinctly claim this, and I think it would not be seriously insisted that the sufferers could recover in such case. Where, then, is the principle upon which A. recovers and Z. fails?

It has been suggested that an important element exists in the difference between an intentional firing and a negligent firing merely; that when a party designedly fires his own house or his own fallow land, not intending, however, to do any injury to his neighbor, but a damage actually results, that he may be liable for more extended damages than where the fire originated in accident or negligence. It is true that the most of the cases where the liability was held to exist, were cases of an intentional firing. The case, however, of Vaughn *v.* Menlove (32 Eng. C. L. 613) was that of a spontaneous combustion of a hayrick. The rick was burned, the owner's buildings were destroyed, and thence the fire spread to the plaintiff's cottage, which was also consumed. The defendant was held liable. Without deciding upon the importance of this distinction, I prefer to place my opinion upon the ground that, in the one case, to wit, the destruction of the building upon which the sparks were thrown by the negligent act of the party sought to be charged, the result was to have been anticipated the moment the fire was communicated to the building; that its destruction was the ordinary and natural result of its being fired. In the second, third or twenty-fourth case, as supposed, the destruction of the building was not a natural and expected result of the first firing. That a building upon which sparks and cinders fall should be destroyed or seriously injured must be expected, but that the fire should spread and other buildings be consumed, is not a necessary or an usual result. That it is possible, and that it is not unfrequent, cannot be denied. The result, however, depends, not upon any necessity of a further communication of the fire, but upon a concurrence of accidental circumstances, such as the degree of the heat, the state of the atmosphere, the condition and materials of the adjoining structures and the direction of the wind. These are accidental and varying circumstances. The party has no control over them, and is not responsible for their effects.

My opinion, therefore, is, that this action cannot be sustained, for the reason that the damages incurred are not the immediate but the remote result of the negligence of the defendants. The immediate result was the destruction of their own wood and sheds; beyond that, it was remote.

There are some cases which, from the frequency of their citation, and their apparent inconsistency with the view I have taken, should be considered in this connection.[1]

Without determining its effect, it will be observed, that the fact exists in each of these cases, that the first act or impulse was volun-

[1] The court here considered the cases of Scott *v.* Shepherd 2 W. Bl. 893; Vandenburgh *v.* Truax, 4 Den. 464; Guille *v.* Swan, 19 Johns. 381.— Ed.

tary and intentional on the part of the defendant. Shepherd intentionally threw his squib; Truax intentionally drove the negro boy; and Swan intentionally descended into the plaintiff's garden and invoked the aid of the multitude. In each case, too, the result was deemed by the court to be the inevitable consequence of the original unlawful or improper act. There would seem to be no inconsistency in principle between either of these cases and the conclusion already announced in the present case. Whether the principle has been always correctly applied, it is not necessary to determine.

That the defendant is not liable in this action may also be strongly argued, from the circumstance that no such action as the present has ever been sustained in any of the courts of this country, although the occasion for it has been frequent and pressing. Particular instances are familiar to all, where such claims might have been made with propriety. The instance of the Harpers, occurring a few years since, is a striking one. (22 N. Y. 441). Their large printing establishment, in the city of New York, was destroyed by the gross carelessness of a workman, in throwing a lighted match into a vat of camphene. The fire extended, and other buildings and much other property was destroyed. The Harpers were gentlemen of wealth, and able to respond in damages to the extent of their liability. Yet we have no report in the books, and no tradition, of any action brought against them to recover such damages. The novelty of the claim, as was said by Judge Beardsley, in Costigan *v.* M. & H. R. R. Co., where the occasion for its being made had been so common, is a strong argument against its validity. (2 Denio, 609.) In The People *v.* Clark (10 Barb. 143), Judge Cady says: "The fact that the plaintiffs have never before this commenced an action to vacate a grant made by the king, because it was made upon false suggestions, furnishes strong evidence that the plaintiffs never had the right to bring such an action." It was Littleton's rule, "what never was, never ought to be." (1 Ver. 385.)

To sustain such a claim as the present, and to follow the same to its legitimate consequences, would subject to a liability against which no prudence could guard, and to meet which no private fortune would be adequate. Nearly all fires are caused by negligence, in its extended sense. In a country where wood, coal, gas and oils are universally used, where men are crowded into cities and villages, where servants are employed, and where children find their home in all houses, it is impossible that the most vigilant prudence should guard against the occurrence of accidental or negligent fires. A man may insure his own house or his own furniture, but he cannot insure his neighbor's building or furniture, for the reason that he has no interest in them. To hold that the owner must not only meet his own loss by fire, but that he must guarantee the security of his neighbors on both sides, and to an unlimited extent, would be to create a liability which would be the destruction of all civilized society. No community could long

exist, under the operation of such a principle. In a commercial country, each man, to some extent, runs the hazard of his neighbor's conduct, and each, by insurance against such hazards, is enabled to obtain a reasonable security against loss. To neglect such precaution, and to call upon his neighbor, on whose premises a fire originated, to indemnify him instead, would be to award a punishment quite beyond the offense committed. It is to be considered, also, that if the negligent party is liable to the owner of a remote building thus consumed, he would also be liable to the insurance companies who should pay losses to such remote owners. The principle of subrogation would entitle the companies to the benefit of every claim held by the party to whom a loss should be paid.

In deciding this case, I have examined the authorities cited from the Year Books, and have not overlooked the English statutes on the subject, or the English decisions extending back for many years. It will not be useful further to refer to these authorities, and it will be impossible to reconcile some of them with the view I have taken.

The remoteness of the damage, in my judgment, forms the true rule on which the question should be decided, and which prohibits a recovery by the plaintiff in this case.[1]

Judgment should be affirmed.

SMITH v. LONDON & SOUTHWESTERN RAILWAY CO.

COURT OF COMMON PLEAS, 1870.

[*Reported L. R. 6 C. P. 14.*]

APPEAL from a decision of the Court of Common Pleas, discharging a rule to enter a verdict for the defendants or a non-suit.

This was an action for negligence, and the declaration contained three counts, of which the second and only material one was as follows: —

"That at the time of the committing by the defendants of the grievances in this count mentioned, the plaintiff was possessed of a cottage and premises, and the defendants were possessed of and had the care and management of a railway running near the said cottage and premises, with banks belonging thereto, and part of the said railway, and were possessed of locomotive engines containing burning substances, which were used by the defendants for conveying carriages along this railway. Yet, by the negligence and improper conduct of the defendants, and the want of due care on the part of the defendants in the

[1] See also O'Neill v. New York O. & W. Ry., 116 N. Y. 579, 22 N. E. 217; Read v. Nicholas, 118 N. Y. 224, 23 N. E. 468; Hoag v. Lake Shore & M. S. R. R., 85 Pa. 293.— ED.

keeping and management of their said railway engines and banks, quantities of cut grass and hedge trimmings were heaped up on the said railway and banks, and became and were ignited, and a fire was occasioned which spread over and along a stubble-field, near the said railway unto the said cottage and premises, and set fire to the same, and thereby the same and the plaintiff's furniture, &c., then being in and near the said cottage and premises, were burnt and destroyed, and the plaintiff lost the use and enjoyment of the same."

The defendants pleaded not guilty, and issue was joined thereon.

The case was tried before Keating, J., at the summer assizes, 1869, held at Dorchester, when evidence was given for the plaintiff, which was in substance as follows: —

It was proved that the defendants' railway passed near the plaintiff's cottage, and that a small strip of grass extended for a few feet on each side of the line, and was bounded by a hedge which formed the boundary of the defendants' land; beyond the hedge was a stubble-field, bounded on one side by a road, beyond which was the plaintiff's cottage. About a fortnight before the fire the defendants' servants had trimmed the hedge and cut the grass, and left the trimmings and cut grass along the strip of grass. On the morning of the fire the company's servants had raked the trimmings and cut grass into small heaps. The summer had been exceedingly dry, and there had been many fires about in consequence. On the day in question, shortly after two trains had passed the spot, a fire was discovered upon the strip of grass land forming part of the defendants' property; the fire spread to the hedge and burnt through it, and caught the stubble-field, and, a strong wind blowing at the time, the flames ran across the field for 200 yards, crossed the road, and set fire to and burnt the plaintiff's cottage. There was no evidence that the defendants' engines were improperly constructed or worked; there was no evidence except the fact that the engines had recently passed, to show that the fire originated from them. There was no evidence whether the fire originated in one of the heaps of trimmings or on some other part of the grass by the side of the line; but it was proved that several of the heaps were burnt by the fire. Two of the company's servants were proved to have been close to the spot when the fire broke out, and to have given the alarm, but they were not called by either side.

At the close of the plaintiff's case the counsel for the defendants submitted that there was no case to go to the jury. At the suggestion of the judge, and by consent, a verdict was taken for the plaintiff for 30*l.*, subject to leave reserved to the defendants to move to set it aside, and instead thereof to enter a verdict for them, on the ground that there was no evidence to go to the jury of any liability on the part of the defendants. The court to be at liberty to draw inferences and to amend the pleadings.

The defendants applied for and obtained a rule pursuant to the

leave reserved, which, after argument, was discharged, and from the judgment so given discharging the rule the present appeal was brought.

Kingdon, Q. C. (*Murch* with him), for the defendants. There is no evidence that the trimmings was the cause of the fire. It was proved that they were partially consumed by it, but not that it originated in them. Nor was there any evidence that the fire was caused by sparks coming from the engine. There were many other ways in which it may have begun which are equally consistent with the evidence. Thus, a fusee may have been thrown from a window of one of the carriages of the train, or one of their workmen on the line may have dropped a spark from his pipe. Where the evidence is equally consistent with the view that the defendants were liable, and that they were not, there is no evidence to go to the jury.

KELLY, C. B. I certainly entertained some doubts during the argument as to whether the judgment of the Court below could be sustained; but when I consider the facts, I cannot but feel that it is a case in which there was some evidence of negligence on the part of the defendants, and negligence which caused the injury complained of. It appears that about the time that the spot in question was passed by an engine which, as we know, would emit sparks which would fall on the adjoining ground, a fire was discovered on the defendants' ground adjoining the line. It appears that it had been a dry summer, and the hot weather had continued for many weeks before the occurrence; and probably with a view to prevent mischief, the defendants had caused the grass that grew by the line and the fence to be cut, and the cuttings of the grass and hedge were placed in small heaps on the ground between the rails and the hedge. On the other side of the hedge was a stubble-field of considerable extent which would be extremely dry, and at a distance of two hundred yards across a road was the cottage belonging to the plaintiff. This was the state of facts. The trimmings caught fire, there was a strong south-east wind blowing; and though we have no proof of the exact progress of the fire, because the company's servants who had seen it were not called, it appears to have extended to and through the hedge and across the field to the plaintiff's cottage which was burnt. The question for us is, how all this occurred. There is some doubt how the fire originated, but there was ample evidence for the jury, which would have been rightly left to them, that it originated from sparks from the engine falling on the dry heaps of trimmings, and thence extending to the hedge and stubble-field. If that was so, the question arises whether there was any negligence in the defendants.

Now it can scarcely be doubted that the defendants were bound in such a summer, knowing that trains were passing from which sparks might fall upon them, to remove these heaps of trimmings; and, at any rate, it was a question for the jury whether it was not negligent of them not to do so. I think, therefore, there was a case for the jury

on which they might reasonably have found that the defendants were negligent in not removing the trimmings as soon as possible, and that this was the cause of the injury. Then comes the question raised by Brett, J., to which at first I was inclined to give some weight. He puts it thus: "I quite agree that the defendants ought to have anticipated that sparks might be emitted from their engines, notwithstanding that they were of the best construction, and were worked without negligence, and that they might reasonably have anticipated that the rummage and hedge trimmings allowed to accummulate might be thereby set on fire. But I am of opinion that no reasonable man would have foreseen that the fire would consume the hedge and pass across a stubble-field, and so get to the plaintiff's cottage at the distance of 200 yards from the railway, crossing a road in its passage." It is because I thought, and still think, the proposition is true that any reasonable man might well have failed to anticipate such a concurrence of circumstances as is here described that I felt pressed at first by this view of the question; but on consideration I do not feel that that is a true test of the liability of the defendants in this case. It may be that they did not anticipate, and were not bound to anticipate, that the plaintiff's cottage would be burnt as a result of their negligence; but I think the law is, that if they were aware that these heaps were lying by the side of the rails, and that it was a hot season, and that therefore by being left there the heaps were likely to catch fire, the defendants were bound to provide against all circumstances which might result from this, and were responsible for all the natural consequences of it. I think, then, there was negligence in the defendants in not removing these trimmings, and that they thus became responsible for all the consequences of their conduct, and that the mere fact of the distance of this cottage from the point where the fire broke out does not affect their liability, and that the judgment of the Court below must be affirmed.

MARTIN, B. I am of the same opinion. The only question we have to decide is, whether there was any evidence for the jury of negligence on the part of defendants which caused the injury complained of. The facts are, that the plaintiff had a cottage near the railway, and that he was perfectly innocent of any thing that could conduce to his loss, and that he had his house burned down. The question is, did the fire come there from any negligent act of the defendants? I think there is evidence that it did. There was evidence of the trimmings being improperly left by the defendants by the side of their line, and that a spark from a passing engine fell on them and caused the fire, which was thus due to the defendant's negligence.

BRAMWELL, B., concurred.

CHANNELL, B. I am of the same opinion. I quite agree that where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, and this is

what is meant by Bramwell, B., in his judgment in Blyth *v.* Birmingham Waterworks Co., 11 Ex. 781; 25 L. J. (Ex.) 212, referred to by Mr. Kingdon; but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.

BLACKBURN, J. I also agree that what the defendants might reasonably anticipate is, as my Brother Channel has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence. I have still some doubts whether there was any evidence that they were negligent, but as all the other judges are of opinion that there was evidence that they were, I am quite content that the judgment of the Court below should be affirmed. I do not dissent, but I have some doubt, and will state from what my doubt arises. I take it that, since the case of Vaughan *v.* Taff Vale Ry. Co., 5 H. & N. 679; 29 L. J. (Ex.) 247, which was expressly affirmed in Brand *v.* Hammersmith Ry. Co., Law Rep. 4 H. L. 171, it is clear that when a railway company is authorized by their Act of Parliament to run engines on their line, and that cannot be done without their emitting sparks, the company are not responsible for injuries arising therefrom, unless there is some evidence of negligence on their part. That being so, I agree that if they have the land at the edge of the line in their own occupation they ought to take all reasonable care that nothing is suffered to remain there which would increase the danger. Then comes the question, is there evidence enough in this case of a want of that reasonable care? It can hardly be negligent not to provide against that which no one would anticipate. I have no doubt that if the company strewed any thing very inflammable, such as, to put an extreme case, petroleum along the side of their line, they would be guilty of negligence. The reasoning for the plaintiff is that the dry trimmings were of an inflammable character and likely to catch fire. My doubt is, whether, since the trimmings were on the verge of the railway on the company's land, if the quickset hedge had been in its ordinary state, they might not have burned only on the company's premises, and done no further harm, and whether the injury, therefore, was not really caused by the hedge being dry, so that it caught fire, and by the fire thus spreading to the stubble-field, and thence to the plaintiff's cottage. I think it is clear that when the company were planning the railway they could not expect that the hedge would become so dry, and therefore were not negligent in putting a hedge instead of a stone wall; and though the drought had lasted some weeks, I can hardly think it was negligent in them not to remove the hedge. I do not say that there is not much in what is said with respect to the trimmings being the cause of the injury, and not the state of the hedge, but I doubt on this point, and, therefore doubt if there was evidence of negligence; if the negligence were once established, it would be no answer that it did much more damage than

was expected. If a man fires a gun across a road where he may reasonably anticipate that persons will be passing, and hits some one, he is guilty of negligence, and liable for the injury he has caused; but if he fires in his own wood, where he cannot reasonably anticipate that any one will be, he is not liable to any one whom he shoots, which shows that what a person may reasonably anticipate is important in considering whether he has been negligent; but if a person fires across a road when it is dangerous to do so and kills a man who is in receipt of a large income, he will be liable for the whole damage, however great, that may have resulted to his family, and cannot set up that he could not have reasonably expected to have injured any one but a labourer.

PIGOTT, B. I am of the same opinion. I had some doubts at first, but in the result I am of the same opinion as is expressed by Keating, J., in his judgment in the court below. He says that he was pressed with the consideration that 'leaving some very inflammable substance along the side of the line where trains were frequently passing was some evidence of negligence. It comes to this, that in a dry summer, with a knowledge of the risk of fire which must be caused, the defendants left heaps of combustible matter along the side of their line; then whether the fire did arise from those heaps was a question for the jury, and it seems clear that it either came from, or was at any rate increased by, the heaps, and so got through the fence to the field, and when once in the field there was no way to stop it till it burned the plaintiff's cottage, and this, as it seems to me, was nothing but what a reasonable man might have anticipated.

LUSH, J. I am also of opinion that there was evidence from which a jury might properly conclude that the fire originated from the sparks falling from the engine, and that the heaps added to its intensity, and thus caused it to burn the hedge and stubble; and I confess it seems to me that the more likely the hedge was to take fire, the more incumbent it was upon the company to take care that no inflammable material remained near to it.[1]

Judgment affirmed.

HOYT v. JEFFERS.

SUPREME COURT OF MICHIGAN, 1874.

[*Reported* 30 *Mich.* 181.]

CHRISTIANCY, J. Jeffers brought his action against Hoyt in the circuit court for the county of Saginaw.

The declaration sets forth, substantially, in the first count, that plaintiff, on the 17th August, 1870, being the owner of lot 1, block 19,

[1] See Louisville N. A. & C. Ry. v. Nitsche, 126 Ind. 229, 26 N. E. 51.— ED.

Hoyt's plat of the city of East Saginaw, together with the frame buildings thereon situate (which the evidence shows to have been a hotel called the Sherman House, a barn, shed and wash-house, on the same lot, used with the hotel), of the value of ten thousand dollars; and the defendant being the owner, and running and operating a steam saw-mill, situated on block four of the same plat, distant about three hundred feet southwesterly from plaintiff's property, he (the defendant), in running and operating the steam saw-mill, used large fires, which emitted and gave off large quantities of sparks of fire through the chimney; that it was the duty of defendant to have used upon said chimney a spark-catcher, which would have prevented the escape of such sparks, or in some other way to have prevented their escape, so that the fire would not be thereby communicated to the property of the plaintiff; yet the defendant, knowing the premises, and that sparks of fire had been repeatedly thrown from said mill upon the property of the plaintiff, and that his buildings had been repeatedly set on fire by such sparks, omitted to do his duty in that behalf, and negligently suffered the top of the chimney of his said mill to remain open, without a spark-catcher thereon, and without using any adequate means to prevent the escape of sparks from the chimney; and while defendant, his agents and servants, were running and operating the mill, to wit, etc., sparks of fire from the chimney of said mill were thrown upon the plaintiff's buildings, and said buildings were thereby set on fire and totally consumed, to plaintiff's damage, etc.

The second count more particularly describes the plaintiff's buildings, and gives their distance from the mill, as "to wit: two hundred feet. . . ." [1]

The only remaining exception which requires notice is to that portion of the charge in which the court says to the jury, after fairly submitting the question of the burning of the Sherman House through defendant's negligence, "If you find as a fact that the fire passed from the building to the other property of the plaintiff upon the same lot, and immediately adjoining, without any other cause than simply the fire naturally burning and consuming the first building, you should give, in addition to the value of the first building, the value of the other buildings destroyed, situate there upon the property, with interest, the same as the other, from the time of its destruction." This charge must be understood with reference to the evidence, which showed that the woodshed of the house separated the barn from the house, that the barn was about five feet from the shed, and the wash-house about six feet from the barn, and all were of wood.

In view of the facts, the very statement of the proposition contended for by the plaintiff in error, must, upon every sound principle, be held to carry with it its own refutation. As well might it be contended that,

[1] So much of the case as involves the question of negligence is omitted.— ED.

because the fire caught in a particular spot on the outside of the Sherman House, which was the only direct result of the negligent use of defendant's chimney, he could not be held for the burning of the inside of the house, or any portion of the outside which caught only by the spread of the fire first kindled by the sparks.

If we are to refine upon questions of this kind, in defiance of practical common sense, the defendant's liability might just as well, upon strict scientific principles, be confined to still narrower limits. The argument is, that, though defendant may be liable for the loss of the particular building first set on fire through his negligence, and such others as are in actual contact with it, yet, his liability cannot be extended to others not in such actual contact, or where there is an intervening space, however small, between them. Now, it is so well settled as to be treated almost as an axiom in natural philosophy, that no two particles of matter actually touch each other, and that there is always an intervening space between them. The defendant's liability must, therefore, be confined to the particular particle or particles of matter which actually first caught fire, and the whole conflagration resulting, not only of the remainder of the particular board or shingle, but of the house, must be treated as a new consequential injury too remote to serve as a safe ground of damages.

This, it may be said, is unreasonable, and ludicrously absurd; and so it is; but it is slightly more absurd or ludicrous than it would be to hold that defendant's liability must be limited to the first building burned, because the others were not a part of it, or in actual contact with it, but five or six feet distant. If such other buildings are satisfactorily shown to have been actually burned by the fire of the Sherman House, caused by the negligence of the defendant, and especially if this was, under the circumstances, the natural and probable, as well as the actual result of the fire so caused, and without any contributory negligence of the plaintiff, I can see no sound principle which can make the defendant's liability turn upon the question whether the buildings thus burned by the fire of the first, were five, six, or fifty feet, or the one-hundredth part of an inch from it.

And though a building thus burned by the fire of the first might be at such a distance that its taking fire from the first might not, *a priori*, have seemed possible, yet, if it be satisfactorily shown that it did, in fact, thus take fire, without any negligence of the owner, and without the fault of some third party, which could properly be recognized as the proximate cause, and for which he could be held liable, the principle of justice or sound logic, if there be any, is very obscure, which can exempt the party through whose negligence the first building was burned, from equal liability for the burning of the second. If it be said that this extent of liability might prove ruinous to the party through whose negligence the buildings were burned, it may be said, in reply, that, under such circumstances, it is better, and more in ac-

cordance with the relative rights of others, that he should be ruined by his negligence, than that he should be allowed to ruin others who are innocent of all negligence or wrong.

I see no error in the record, and the judgment should be affirmed, with costs.[1]

The other justices concurred.

MILWAUKEE & ST. PAUL RAILWAY CO. *v.* KELLOGG.

SUPREME COURT OF THE UNITED STATES, 1876.

[*Reported* 94 *U. S.* 469.]

STRONG, J. This was an action to recover compensation for the destruction by fire of the plaintiff's saw mill and a quantity of lumber, situated and lying in the State of Iowa, and on the banks of the river Mississippi. That the property was destroyed by fire was uncontroverted. From the bill of exceptions, it appears that the "plaintiff alleged the fire was negligently communicated from the defendant's steamboat 'Jennie Brown' to an elevator built of pine lumber, and one hundred and twenty feet high, owned by the defendants, and standing on the bank of the river, and from the elevator to the plaintiff's saw mill and lumber piles, while an unusually strong wind was blowing from the elevator towards the mill and lumber. On the trial, it was admitted that the defendants owned the steamboat and elevator; that the mill was five hundred and thirty-eight feet from the elevator, and that the nearest of plaintiff's piles of lumber was three hundred and eighty-eight feet distant from it. It was also admitted that there was conflict between the parties plaintiff and defendant respecting the ownership of the land where the mill stood and the lumber was piled, both claiming under a common source of title. The plaintiff had built the mill, and he was in the occupation of it, believing he had a right to be there. . . ."[2]

The next exception is to the refusal of the court to instruct the jury as requested, that "if they believed the sparks from the 'Jennie Brown' set fire to the elevator through the negligence of the defendants, and the distance of the elevator from the nearest lumber pile was three hundred and eighty-eight feet, and from the mill five hundred and twenty-eight feet, then the proximate cause of the burning of the mill and lumber was the burning of the elevator, and the injury was too remote from the negligence to afford a ground for a recovery." This proposition the court declined to affirm, and in lieu thereof submitted to the jury to find whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of

[1] See Martin *v.* New York & N. E. R. R., 62 Conn. 331, 25 Atl. 239.— ED.

[2] Part of the opinion is omitted.— ED.

the elevator; whether it was a result which, under the circumstances, would naturally follow from the burning of the elevator; and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected. All this is alleged to have been erroneous. The assignment presents the oft-embarrassing question, What is and what is not the proximate cause of an injury? The point propounded to the court assumed that it was a question of law in this case; and in its support the two cases of Ryan *v.* The New York Central Railroad Co., 35 N. Y. 210, and Kerr *v.* Pennsylvania Railroad Co., 62 Penn. St. 353, are relied upon. Those cases have been the subject of much criticism since they were decided; and it may, perhaps, be doubted whether they have always been quite understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent wrongdoer, they have not been accepted as authority for such a doctrine, even in the States where the decisions were made. Webb *v.* The Rome, Watertown & Ogdensburg Railroad Co., 49 N. Y. 420, and Pennsylvania Railroad Co. *v.* Hope, 80 Penn. St. 373. And certainly they are in conflict with numerous other decided cases. Kellogg *v.* The Chicago & North-western Railroad Co., 26 Wis. 224; Perley *v.* The Eastern Railroad Co., 98 Mass. 414; Higgins *v.* Dewey, 107 *id.* 494; Tent *v.* The Toledo, Peoria & Warsaw Railroad Co., 49 Ill. 349.

The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. 2 Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible nature of the saw

mill and the piles of lumber. Most of these circumstances were ignored in the request for instruction to the jury. Yet it is obvious that the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building constructed of stone, if the season had been wet, or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far-reaching than would have been natural or probable in other circumstances. We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inqury must be answered in accordance with common understanding. In a succession of dependent events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct. In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time.

If we are not mistaken in these opinions, the Circuit Court was correct in refusing to affirm the defendants' proposition, and in submitting to the jury to find whether the burning of the mill and lumber was a result naturally and reasonably to be expected from the burning of the elevator, under the circumstances, and whether it was the result of the continued influence or effect of the sparks from the boat, without the aid or concurrence of other causes not reasonably to have been expected. The jury found, in substance, that the burning of the mill and lumber was caused by the negligent burning of the elevator,

and that it was the unavoidable consequence of that burning. This, in effect, was finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff. The judgment must, therefore, be affirmed.

Judgment affirmed.

KUHN *v.* JEWETT.

COURT OF CHANCERY, NEW JERSEY.

[*Reported* 32 *N. J. Eq.* 647.]

VAN FLEET, V. C. The petitioners in this case ask to be compensated for damages they allege they have sustained in consequence of the negligence of the defendant's employees. Their barn and its contents were destroyed by fire, and they claim that the defendant is legally answerable for the loss. The fire originated in a disaster which occurred on the defendant's road, at Paterson, on the 7th of December, 1877, in which twenty-five cars loaded with petroleum collided with a locomotive attached to a freight train. An oil train had been cut in two, twenty-five cars being detached, and five or six left attached to the locomotive. Those detached were left standing at a point where the grade descended to their rear at the rate of thirty-five feet to the mile. Very shortly after they were detached, they commenced moving down grade, and their momentum and velocity soon became so great as to render any effort to arrest them, by the force at hand, futile. When the cars came in collision with the locomotive, some of the oil tanks were thrown from the cars to the earth with such force as to cause them to burst, and to discharge their contents. The oil, thus released, spread over the road bed, and came in contact with fire shaken from the locomotive by the collision, and was set on fire, and, thus ignited, ran down the embankment into a small brook, over which the railroad at that point is constructed, and was carried by its water to the Passaic river, and from there by the water of the river to the petitioners' building, which stood on the bank of the river, and set it on fire and destroyed it.

The evidence renders it clear, I think, that the collision was the result of negligence. When it is remembered that twenty-five loaded cars were left standing on a descending grade, in charge of a single brakeman, with brakes applied to only about one-fourth of their number, and that they commenced running away almost as soon as they were detached, and that no malicious or improper intermeddling with them is shown, there does not seem to be the least difficulty in determining what was the cause of the collision. They ran away because they were not properly secured. Their position and precipitancy

show, of themselves, that they were not handled and secured with the necessary skill and care.

The case, however, presents another question. Do the facts show that there was such a break in the connection between cause and effect, that it can be declared, as a legal conclusion, that the petitioners' damages were not the proximate as well as the natural result of the defendant's negligence, but were rather caused by an independent intervening agency, over which the defendant had no control, and for whose action or influence he cannot be held legally responsible? The usual statement of the rule upon this subject is, that damages caused by negligence, to be recoverable, must not only be its natural, but also its proximate, consequence. And "proximate," as used in this in proposition, means closeness of causal connection, and not nearness in time or distance, and is intended to qualify the generality of the idea expressed by the word "natural." Del. Lack. & West. R. R. Co. *v.* Salmon, 10 Vr. 308. Damages arising from this cause, to be the basis of legal redress, must not only be the natural sequence of the wrongful act or omission, but must flow directly from it, in obedience to some well-understood and recognized material force. Whart. on Neg., § 97.

There can be no doubt, I think, if, in this instance, the flames of the burning oil had been carried by the wind directly from the point of collision to the petitioners' building, and it had been thus set on fire and destroyed, that the injury would, in judgment of law, have been the natural and direct or proximate result of the collision. So, too, if the burning oil had descended from the point where it was first ignited, by the mere force of its own gravity, upon the petitioners' building, and destroyed it, the connection between cause and effect would have been so close and direct that the defendant's liability could not have been successfully questioned. So, also, if the fire had been carried from the place of its origin to the petitioners' building by a train of combustible matter deposited in its track by the operation of the laws of nature, the petitioners' injury, I think it could not have been doubted, would have been esteemed the direct result of the defendant's negligence. It was distinctly ruled in Del. Lack. & West. R. R. Co. *v.* Salmon, *ubi supra*, that where a fire originates from carelessness, and is carried from the point of its origin to the place where the damage is done, by combustible matter furnished by nature, such matter does not break the chain of causation so as to relieve the defendant from liability, but is to be regarded as one of its constituent links. And it was also adjudged that in cases where a fire, negligently kindled, is not immediately communicated to the property destroyed — as, for example, where it is communicated from one building to another until it reaches the plaintiff's building — causal connection only ceases when, between the negligence and the damage, an object is interposed which would have prevented the damage, if due care had

been taken. The example given by the author of this rule, in illustration, is this: A house is negligently permitted to take fire; another house, some distance off, being built negligently of material easily ignited, catches fire from the first, and then communicates the fire to a third, which, if properly built and guarded, would not have thus caught. The person whose negligence started the fire is not liable to the owner of the third house, because his injury is due, in part, to an intervening cause combined with his own negligence. Whart. on Neg., § 149.

These principles must rule this case. Their application is obvious. For, although water is almost universally used as a means to extinguish fire, and it seems, at first blush, to be absurd to say that it can be used for the purpose of extending it, yet it is true, as a matter of fact, that as an agency for the transmission of burning oil, it is just as certain and effectual in its operations as the wind in carrying flame or a spark, or combustible matter in spreading a fire. In keeping up the continuity between cause and effect, it may be just as certain and effectual in its operation as any other material force. In this instance, it carried the consequences of the defendant's negligence to the petitioners' property, with almost as much certainty and directness as if the burning oil had descended upon it in obedience to the law of gravitation.

This view is in conflict with that pronounced by the Supreme Court of Pennsylvania in Hoag *v.* Lake Shore and Michigan Southern R. R. Co., 85 Pa. St. 293, a case which, in its facts, is substantially the counterpart of the one in hand. The water of a running stream was there held to be an intervening agency sufficiently independent and powerful to constitute a new force, without which the injury might not have happened; and it was, therefore, held that it caused a sufficient break in the chain of causation to relieve the defendant from liability. The capacity and adaptability of a running stream as an agency for the transmission of burning oil, and its similitude to other material forces as a means of communicating this species of fire, does not seem to have been considered by the court, at least no allusion is made to it. The case is not, however, entitled to the respect due to an independent adjudication, where the court, untrammeled by previous utterances, simply endeavors to ascertain what rule will best promote justice and conform to enlightened reason and sound policy. The judgment is, in fact, a mere affirmation of principles previously promulgated in Ryan *v.* N. Y. Central R. R. Co., 35 N. Y. 210, and subsequently followed in Pennsylvania R. R. Co. *v.* Kerr, 62 Pa. St. 353. These cases were recently strongly disapproved by the court of errors and appeals of this State, as standing opposed to both precedent and principle. Del. Lack. & West. R. R. Co. *v.* Salmon, *ubi supra.*

The rule established by the case just mentioned, I understand to be this: That where a fire originates in the negligence of a defendant, and is carried directly by a material force, whether it be the wind, the

law of gravitation, combustible matter existing in a state of nature, or other means, to the plaintiff's property and destroys it, and it appears that no object intervened between the point where the fire started and the injury, which would have prevented the injury, if due care had been taken, the defendant is legally answerable for the loss. Under this rule, the defendant is liable for the petitioners' loss.

There is no difficulty in measuring the damages in this case. All the evidence, in relation to them, came from the mouth of one of the petitioners. His statements seemed to be exceptionally frank and fair. I have no doubt of the correctness of his estimates. According to them, the property destroyed was worth $427.60. That sum, with interest, will be awarded.

MILLER v. KELLY COAL CO.

SUPREME COURT OF ILLINOIS, 1909.

[*Reported* 239 *Ill.* 626.]

THIS is an appeal from a judgment of the Appellate Court for the Third District affirming a judgment for $3000 rendered by the Circuit Court of Vermilion County in favor of appellee, and against appellant, for personal injuries sustained by appellee while working as a mule driver in the coal mine of appellant.

The declaration contained two counts. The first count charged that plaintiff was employed in defendant's mine, at the time of his injury, as a mule driver, in hauling coal along the sixth northwest entry; that the defendant, disregarding its duty in that behalf, negligently and carelessly furnished plaintiff a mule that was vicious and disposed to kick, which the defendant knew and which the plaintiff did not know; that on the morning of the second day plaintiff had driven the mule in the usual course of his employment, and while, in the exercise of ordinary care for his own safety, he was hauling coal along the entry about opposite Room 30 of said entry, said mule, without provocation, began kicking and kicked plaintiff down in front of the car; that, because of a gob of rock, dirt, and other debris which defendant had permitted to accumulate on either side of the track to a height of, to wit, three feet, plaintiff was unable to escape and get away from the mule and the car, and was thereby caught beneath the car, loaded with about four tons of coal; that said car was pulled up against, upon, and over plaintiff, thereby crushing the bones of his chest and injuring him in the hips, arms, head, and divers other parts of his body. The second count of the declaration charged the defendant with failing to use reasonable care to provide the plaintiff with a reasonably safe place in which to work. The second count was taken from the jury by the court and the cause was submitted upon the first count only.

FARMER, J. The principal contention of appellant is that the kick-

ing by the mule was not the proximate cause of the injury, and that the trial court erred in not directing a verdict in its favor upon that ground.

Appellee testified that when the mule kicked him the first time he was standing on the bumper of the car; that he then attempted to get out of the way, but by reason of a gob next to the track extending up so high, he was unable to do so and the mule kicked him down on the ground under the car; that if it had not been for the gob he would have gotten out of the way. Appellee's injury occurred on the 31st of May and he had been driving in the sixth northwest entry since the 4th of March previous. He testified the gob had been in the same condition and he had seen it several times a day during the period he had been driving in that entry. Appellant contends that the injury would not have occurred but for the gob; that this was an independent cause of the injury, and therefore the kicking by the mule was not the proximate cause of said injury. We think the trial court was warranted in refusing to direct a verdict for appellant upon that theory. The law was correctly stated by the Appellate Court in the following language: "The proximate cause of an injury is that act or omission which immediately causes and without which the injury would not have happened, notwithstanding other conditions or omissions concurred therewith. It is obvious that in the case at bar the immediate cause of appellee's injuries was the kicks he received from the mule; that, had not the mule kicked, appellee would not have been harmed by the presence of the gob. Even though the gob be held to have been a concurring or intervening cause of the injury, appellant would be nevertheless liable for the reason stated." This is abundantly sustained by the following authorities: Pullman Palace Car Co. *v.* Laack, 143 Ill. 242; Springfield Consolidated Railway Co. *v.* Puntenney, 200 id. 9; Chicago Terminal Railroad Co. *v.* Schmelling, 197 id. 619; City of Joliet *v.* Shufeldt, 144 id. 403; Missouri Malleable Iron Co. *v.* Dillon, 206 id. 145. In Armour *v.* Golkowska, 202 Ill. 144, this court said (p. 149): "In City of Joliet *v.* Shufeldt, 144 Ill. 403, we deduced from the authorities the general doctrine that it was not a defense to an action for injuries occurring by reason of the negligent act of the defendant that the negligence of a third person or an inevitable accident or an inanimate thing contributed to cause the injury to the plaintiff, if the negligence of the defendant was an efficient cause and without which the injury would not have occurred." In Commonwealth Electric Co. *v.* Rose, 214 Ill. 545, the court said (p. 554): "Where an injury is the result of the negligence of the defendant and an inevitable accident, or an inanimate thing has contributed with the negligence of the defendant to cause the injury, the plaintiff may recover, if the negligence of the defendant was an efficient cause of the injury and the injured of deceased party was in the exercise of ordinary care for his own safety."

SECTION II.

Interposition of a Natural Force.

SCOTT *v.* HUNTER.

SUPREME COURT OF PENNSYLVANIA, 1863.

[*Reported* 46 *Pa.* 192.]

STRONG, J. This was an action of trespass on the case, brought to recover the value of two coal-boats, with their cargoes, belonging to the plaintiffs, and lost, as they aver, through the unlawful, wilful, malicious, and negligent conduct of the defendants. The declaration contained two counts, the first of which averred that the defendants had caused the loss of the boats by unlawfully, wilfully, and maliciously mooring their own coal-boats in the channel and entrance to the locks at one of the dams of the Monongahela Navigation Company, on the Monongahela river, and keeping them in that situation, thus stopping the navigation for the plaintiffs' boats, and detaining them in the river, though they were ready and prepared to proceed on their voyage, while the river was rapidly rising, and until the power of the current forced them over the dam and caused a total wreck. The second count charged unlawful and negligent conduct of the defendants in the management of their boats at the locks, thus obstructing the entrance thereto, and the channel of the river, and preventing the passage of the plaintiffs' boats, while the river was rapidly rising and exposing them to great hazard, and while the defendants well knew the boats were in danger. It further averred that with this knowledge, the obstructions were continued by the defendants, until the plaintiffs' boats were carried over the dam by the current, and totally lost.

On the trial, the jury, under instructions given by the court, found a verdict for the plaintiffs, and assessed damages, thus establishing that the defendants were guilty of the misconduct and negligence complained of, and that the plaintiffs were chargeable with no negligence or default which contributed to the loss. Both these questions were submitted plainly to the jury, and they are now at rest. But the court reserved the question whether the connection between the defendants' wrongful acts and the loss of the boats over the dam was sufficiently close, to enable the plaintiffs to maintain their action, and, after consideration, being of opinion that the rapid rise in the river and the consequent increased current was the proximate cause of the loss, and that the wanton or negligent obstruction of the locks, and of the channel of the river, was a cause too remote, entered judgment for the defendants *non obstante veredicto*.

It is observable that the jury did not pass upon the question whether the defendants ought not to have apprehended that their unlawful

and continued obstruction of the entrance to the locks might result in the plaintiffs' boats being swept by the current over the dam, and lost, as they were. This was not submitted to them. The court assumed that the sudden rise of the river, and the danger to the plaintiffs' boats, could not have been anticipated by ordinary prudence and care. Now it is very obvious that if the defendants, while they were wantonly or negligently keeping their own boats at the entrance of the locks, and preventing the passage of the plaintiffs', knew the danger to which their unlawful act exposed the property of the plaintiffs, as it is averred in the declaration they did, they are responsible for the damage which resulted from their act, though it was not the most proximate cause. And so, if they ought to have known the danger, as men of ordinary prudence, and yet persisted in maintaining the obstruction, they are responsible. It is a familiar principle that a man is answerable for such consequences of his unlawful acts as are natural, and may be foreseen by ordinary forecast. What is ordinary care in the performance of an act depends upon the surrounding circumstances.

It is greater or less, according to the increased or diminished hazard to others with which it is done. That may be prudent if done in a wilderness, which would be grossly careless if done in a crowded city. Why? Because no injurious consequences would naturally be expected in the one case, while in the other they may be almost inevitable. Hence the actor is bound to anticipate more in the one case than in the other, and as he is liable for all he should have foreseen, the extent of his responsibility is not the same.

In the present case, the defendants obstructed the passage through the locks from about four o'clock in the afternoon of April 9th, until in the afternoon of the 10th of April, and until after the plaintiffs' boats had been carried over the dam. Their act was unlawful, either wanton or negligent. During all the time, they saw the river rising rapidly, and with it, of course, the current increasing. From two o'clock on the morning of the 10th, until the disaster occurred, the water rose at the rate of nearly a foot in an hour, and of course the pressure of the current was becoming greater. Meanwhile the plaintiffs' boats were moored out in the stream, outside of the defendants' boats, exposed to all the downward pressure of the current, without any fault of theirs, as the jury have found, but with the full knowledge of the defendants. In that position they were kept for hours by the tortious conduct of the defendants. Under such circumstances, it is highly probable the jury would have found, had the question been submitted to them, that the defendants knew of the danger to which their unlawful conduct exposed the property of the plaintiffs, and that with ordinary prudence they must have foreseen what did happen, *i. e.*, the loss of the boats, a loss which they might have prevented, by dropping their own boats through the locks. If they should have anticipated

it, then it was a natural consequence of their acts, for which they must answer in damages. Here we think the court erred in assuming, or undertaking to decide as a matter of law, that the wreck of the boats was not a natural consequence of the wrongful act of the defendants, in blocking up the locks and the channel of the river, and holding the boats of the plaintiffs so long exposed to the force of the current. It was a natural consequence, if it should have been foreseen, or if it would have been guarded against by men of ordinary prudence, using their own rights with proper regard to those of others. And it was manifestly for the jury to determine whether it was a natural consequence, such as should have been foreseen by the defendants at the time, and in the circumstances in which they acted, or rather in which they failed to act.

It is quite probable that this view altogether escaped the notice of the learned judge who tried the cause, in consequence of the mode in which the case was presented. His attention appears to have been directed to the relative character of the causes of the loss, as proximate or remote, rather than to the inquiry whether it was a natural consequence of either. It is an undoubted rule that the proximate rather than the remote cause is to be regarded as the author of a mischief. The old maxim is, "*causa proxima, non remota, spectatur.*" It is, however, a maxim exceedingly difficult of application. Indeed, it is impossible by any general rule to draw a line between those injurious causes of damage which the law regards as sufficiently proximate, and those which are too remote to be the foundation of an action. The court below ruled the case mainly on its supposed resemblance to Morrison *v.* Davis, 8 Harris 171. There the defendants, who were carriers on the Pennsylvania-Canal, and whose boat had been wrecked by a breach in the canal caused by an extraordinary flood, whereby the plaintiff's goods were injured, were held not to be liable on account of their having started on the voyage with a lame horse, in consequence of which they were delayed in passing the place where the accident happened, in time to escape it. That ruling was undoubtedly correct. There was no necessary connection between the use of the lame horse and the destruction of the boat. They were remote from each other in time, as well as in place, and there were intermediate causes. Had the horse been still more lame and unfit, thus occasioning greater delay, the loss would not have happened. The present case is of a different character. The wrongful act of the defendants was concurrent in time and in operation with the flood in the river. It was both combined that forced the plaintiffs' boats over the dam. The defendants' acts pushed them out into the current, and held them there until they were swept away. We must not forget that the verdict settles there was no default in the plaintiffs, either in having moored their boats with an insufficient line, or in having placed them where they were placed. Now if the defendants had by direct force

pushed the boats out into the current, and they had been swept over the dam, as they were, it would not be doubted that in an action of trespass the value of the boats might have been recovered. The consequence would be held sufficiently near the cause. The forcible pushing out would be held the "*causa causans*," acting through the current, and trespass would be maintained: Burdick *v.* Worrall, 4 Barb. 496. Yet the consequence would have been just as remote from the unlawful act in that case as it is in this. In both cases the flood is in one aspect the nearest agent. Why, then, was the wrongful obstruction of the entrance to the locks not a sufficiently proximate cause of the injury? We think it was, and that the District Court erred in coming to a different conclusion. In Lund *v.* Tyngsboro, 11 Cush. 563, it was held that if a traveller, exercising ordinary care and prudence, voluntarily leaps from his carriage and is injured, because of its near approach to a dangerous defect in the highway, the town is liable, though the carriage did not come into actual contact with the defect. In McAfee *v.* Crofford, 13 Howard 447, where in consequence of a wrongful abduction of the plaintiff's slaves, a flood in a river swept away his wood, it was held that the plaintiff might recover the value of the wood in an action for carrying away the slaves. This case goes very far beyond what we feel prepared now to assert. In Dickinson *v.* Boyle, 17 Pick. 78, where the defendant had broken and entered the plaintiff's close adjacent to a river, and had carried away gravel from a bank near to a dam across the river, in consequence of which a flood in the river three weeks afterwards swept away a portion of the close and a cider-mill, it was held the whole damage might be recovered. In Hearny *v.* Hearny, 2 Denio 625, it was ruled that if the owner of a dock untie a vessel lawfully moored therein, and set it adrift, he is answerable for the loss sustained by its subsequent stranding elsewhere.

In George *v.* Fiske, 32 N. H. 32, where the defendants had put a large quantity of logs on the ice of a river, and exercised no further care in regard to them, and, on the ice breaking up, a dam was formed by the logs and the ice, whereby a channel was cut through the land of the plaintiff, and the logs carried upon it, the defendants were held liable. So in our own case of Pittsburgh *v.* Grier, 10 Harris 54, the city of Pittsburgh was held liable for the loss of a steamboat, upon the following state of facts: The boat had anchored at the wharf, when the water was low. The river rose afterwards, covering certain piles of pig iron negligently left by the city on the wharf, about a foot above low-water mark. To avoid these piles, the boat was compelled to back out into the stream, when she was struck by some floating body, stove, and sunk. Citations of similar decisions might be indefinitely multiplied. They do not enable us to define precisely what is regarded a remote and what a proximate cause, but they do show that the wrongful conduct of which these defendants are convicted

cannot be considered so remote a cause of the loss sustained by the plaintiffs, as not to afford ground for an action.

For these reasons we reverse the judgment, but as it appears from the record there are other questions in the case, which are not now before us, we do not enter judgment on the verdict, but we send the case back for a new trial.

Judgment reversed, and a *venire de novo* awarded.[1]

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DERRY v. FLITNER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1875.

[*Reported* 118 *Mass.* 131.]

MORTON, J. The plaintiffs were engaged in building a sea wall for the Boston Gas Light Company, around and in front of their wharf at Commercial Point. There was evidence tending to show that the Gas Light Company had given to the plaintiffs the exclusive right to use the wall to lay their vessels at as a place of safety in case of storms.

The judge, who tried the case without a jury, has found that the plaintiffs had such exclusive right, and it is not our province to revise his findings upon any questions of fact. The defendant Dutch, therefore, had no right to use the wall to the exclusion of the plaintiffs' vessels, and having done so, and having refused to remove his vessel when requested, he is guilty of a violation of the plaintiffs' rights, for which they may recover, in this action of tort, whatever damages they sustained by reason of the tortious acts of the defendant. The ruling of the Superior Court to this effect was correct.

The defendant contended, and asked the court to rule, "that the damage alleged and proved is too remote from the act complained of, and is not the proximate consequence of the same sufficiently in law to render the defendants or any of them liable therefor."

The facts bearing upon this question are as follows: At the time of the accident, the plaintiffs had several vessels engaged in bringing and laying stone for the construction of the sea wall. Most of the wall had been built only up to low water mark, but the plaintiffs, in the beginning of the work, had built about two hundred feet of the wall to a height of thirteen feet above low water mark, for the purpose of furnishing a safer place to lay their vessels at in case of easterly winds or heavy seas. They could lay two of their vessels behind this high part of the wall. On the night of the accident this part of the wall was wholly occupied by the defendant's schooner, so that there was no room for any other vessel. The plaintiffs had five vessels at the sea wall. About five o'clock it began to blow strongly from the eastward; the storm increased during the night, and about eleven o'clock two

[1] See St. Louis S. W. Ry. v. Mackey, 95 Ark. 297, 129 S. W. 78; Marsh v. Great Northern Paper Co., 101 Me. 489, 64 Atl. 844.— ED.

of the plaintiffs' vessels were sunk. The court found as a fact that the storm was such as is not uncommon in this climate.

The defendant contends that the injury to the plaintiffs was the result of the storm solely, and that he is not liable for it, although his exclusion of the plaintiffs' vessels from a place of safety behind the wall was tortious. The cases upon this subject are numerous. The rule is well settled and is constantly applied in this Commonwealth, that one who commits a tortious act is liable for any injury which is the natural and probable consequence of his misconduct. He is liable not only for those injuries which are caused directly and immediately by his act, but also for such consequential injuries as, according to the common experience of men, are likely to result from his act. And he is not exonerated from liability by the fact that intervening events or agencies contribute to the injury. The true inquiry is whether the injury sustained was such as, according to common experience and the usual course of events, might reasonably be anticipated. A few of the more recent cases are cited. Hoadley *v.* Northern Transportation Co., 115 Mass. 304; Metallic Compression Casting Co. *v.* Fitchburg Railroad, 109 Mass. 277; Salisbury *v.* Herchenroder, 106 Mass. 458; Wellington *v.* Downer Kerosene Oil Co., 104 Mass. 64; Carter *v.* Towne, 98 Mass. 567; McDonald *v.* Snelling, 14 Allen, 290.

Applying these principles to the case at bar, we are of opinion that the injury to the plaintiffs' vessels by the storm was an injury which was reasonably to be apprehended as a consequence of their exclusion from the place of safety furnished by the sea wall. The wall was built for protection against storms. It is found as a fact that the storm which arose was not an uncommon one in this climate. It was reasonably to be anticipated that such a storm might arise, and that vessels exposed to it would be in danger of injury. The wrongful act of the defendant, in taking and retaining exclusive possession of this place of safety, exposed the plaintiffs' vessels to the dangers of the storm, and the injury which they sustained was the natural and probable consequence of this wrongful act. Within the rule above stated, the defendant is liable for such injury.

The defendant now contends that, as the plaintiffs had four vessels which they were accustomed to lay at the place occupied by his schooner, it was not and cannot be shown that the two vessels which were sunk would have occupied the place if his schooner had not been there. This presents a question of fact and not of law. It was a fact capable of proof with such reasonable certainty as the law requires, that the two vessels sunk would have been placed there for safety. The presiding judge has found this fact in favor of the plaintiffs. There is some evidence reported in the bill of exceptions tending to prove this fact, and it does not appear that all the evidence is reported. We cannot say as matter of law that the finding was erroneous.

The same considerations dispose of the only other point taken by

the defendant, viz., that it was not proved that the two vessels sunk would have been entirely safe if they had occupied the place behind the sea wall. This is a question of fact upon which there was some evidence, and we cannot revise the finding of the court upon it.[1]

Exceptions overruled.

JACKSON v. WISCONSIN TELEPHONE CO.

SUPREME COURT OF WISCONSIN, 1894.

[*Reported* 88 *Wis.* 243.]

APPEAL from the Circuit Court for Chippewa County.

This action is brought to recover damages for a barn and its contents, burned, as plaintiff claims, by reason of defendant's negligence. Near the city of Eau Claire there is a plateau about eighty feet above the level of the surrounding country. In August, 1889, two large frame buildings, about 325 feet distant from each other, stood upon this plateau, one being a county fair building known as Floral Hall, and the other being the barn of the plaintiff. These buildings were about the same height, and upon the top or ridge of each there stood a flagpole or mast twenty to thirty feet in height. Prior to the year 1888 the defendant had constructed a telephone line from the highway running past the fair grounds. In September, 1888, the defendant placed a telephone in Floral Hall, and connected it with No. 12 wire with its telephone line on the highway. This connecting wire ran from the highway first to the flagpole upon plaintiff's barn, and was there tied to the pole; from thence it ran directly to Floral Hall. There was a dispute as to the place where this wire was fastened to Floral Hall, the plaintiff's witnesses testifying that it was fastened directly to the flagstaff upon Floral Hall, a foot or so above the roof, while the defendant's witnesses claim that it was attached to nails on the side of the building. The plaintiff gave no permission to attach the wire to his barn, and testified that he had no knowledge that it was so attached. A ground wire from the telephone in the interior of Floral Hall ran up to the flagstaff, and thence a distance of about 376 feet to the ground, where it was attached to an iron water pipe. Some time in the fall of 1888 the defendant took out the telephone from Floral Hall, together with the insulated wire in the interior of the building. The ground wire was left intact, and so was the wire from Floral Hall to the barn. The wire from the highway to Jackson's barn was taken down, but it was claimed by the plaintiff's witnesses that a considerable piece of said wire at the barn end thereof was left resting upon the roof of the barn.

On the night of the 20th day of August, 1889, there was considerable rain. At about 4 o'clock in the morning there was a flash of lightning,

[1] See Grand Valley Irr. Co. v. Pitzer, 14 Colo. App. 123, 59 Pac. 420; Smith v. Faxon, 156 Mass. 589, 31 N. E. 687; Bonner v. Wingate, 78 Tex. 333, 14 S. W. 790. — ED.

which was described by the witnesses as a blinding flash, and which was thought by them to have descended upon Floral Hall. In a few minutes the roof of plaintiff's barn was in flames, and the barn and its contents were destroyed. Two men were sleeping in a shed or building upon the fair ground, and they immediately went to the barn, and testify that the flagpole upon Floral Hall was completely shattered, while the flagpole upon the barn was untouched. The plaintiff's claim is that the lightning struck Floral Hall, and was conducted by the wire to plaintiff's barn, and set it on fire, and that the defendant was negligent in leaving the wire thus attached to the barn. Much expert evidence was adduced on both sides as to the probability of lightning passing over such a wire and destroying the barn. A motion for non-suit was overruled, as was also a motion to direct a verdict for defendant.

The jury returned a special verdict, finding: First, that the defendant connected the plaintiff's barn with Floral Hall by means of a telephone wire attached to the flagstaff of the barn and to the flagstaff on Floral Hall, without any intermediate attachment; second, that defendant left the wire so located on the plaintiff's barn that a portion of the same rested on the roof; third, that the barn was thereby subjected to danger of being destroyed by fire caused by lightning electricity passing over such wire from Floral Hall to the barn; fourth, that the fire was caused by lightning electricity so passing over said wire; fifth, that in so leaving the barn connected with Floral Hall the defendant's servants were guilty of want of ordinary care; sixth, that such want of ordinary care was the proximate cause of fire; seventh, that this result was one which a person reasonably well skilled in the defendant's business might reasonably have expected would probably occur; eighth, that the plaintiff did not give defendant permission to attach the wire to his barn; ninth, that plaintiff did not know, before the fire, that his barn was connected with Floral Hall by the wire; tenth, that he did not know of the danger before the fire; eleventh, that the plaintiff's damages were $9,258. From judgment for the plaintiff upon this verdict the defendant appeals.

WINSLOW, J. It was strenuously and ably argued by the appellant's counsel that the evidence did not show that the negligent act of defendant was the proximate cause of the burning of plaintiff's barn. The rule is well settled in this state that, in order to render a negligent act the proximate cause of an injury, it must appear "that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." Atkinson *v.* Goodrich Transp. Co. 60 Wis. 141, 156; Marvin *v.* C., M. & St. P. R. Co. 79 Wis. 140. The jury found all the elements necessary to constitute the negligent act of the defendant the proximate cause of the burning of the barn within this rule, and the question is whether the evidence justifies such

finding. It is said that the striking of a building by lightning is a very infrequent occurrence, and that it could not be reasonably anticipated by any one. It is true that the number of buildings which are struck by lightning, as compared with the whole number of buildings in any given locality, is very small; but this fact by no means seems to us to be the final or controling test of the question of probability. In this case there was a building situated upon a high plateau from eighty to ninety feet above the level of the surrounding country, with a flagpole upon the roof about twenty-five feet in height. Now, there are some facts of common knowledge known to every reasonable person who has passed the age of childhood. Among these facts are that in this latitude there are at certain seasons of the year frequent and violent thunderstorms; that at such times the clouds are heavily charged with electricity, which constantly finds its way to the earth in what we call strokes of lightning; that these lightning strokes, in the great majority of cases, strike prominent objects, such as trees, poles, and high buildings, and follow them to the ground; that fire is frequently the result of such strokes. These facts are well known to all persons, and no proof of them by expert evidence is necessary. Can we say, as matter of law, in view of these well-known facts, that it was entirely improbable that a building situated, as Floral Hall was, upon the highest ground in the vicinity, with a flagpole upon it, should be struck by a discharge of lightning, simply because many buildings in such situations escape the stroke for years? We think not.[1]

By the court.— Judgment affirmed.[2]

NEWMAN, J. The cause of damages is proximate only when it might reasonably have been expected by a man of ordinary intelligence and prudence that such damages would result from that cause. Atkinson *v.* Goodrich Transp. Co., 60 Wis. 141. The damages, as a consequence of the negligent act or omission, must be both natural and probable. Barton *v.* Pepin Co. Agr. Society, 83 Wis. 19. It cannot be said of any particular building that it is probable that it will be struck by lightning. The chances are very largely against it. It could not have been foreseen as likely to happen that either Floral Hall or the plaintiff's barn would be struck by lightning. That might be, in the course of nature, but could not be anticipated as probable. The neglect of the defendant to remove the wire did not increase the danger or probability that either building would be struck. At most, it only rendered it possible that, in case either was struck, fire might be communicated to the other. It could not be the cause of either building being struck. It was a condition, rather than the cause, of the damages. If a cause at all, it was a remote cause.

PINNEY, J. I concur in the foregoing opinion by Mr. Justice Newman.

[1] Part of the opinion is omitted. — ED.

[2] See Beaming *v.* South Bend Elec. Co., 45 Ind. App. 261, 90 N. E. 786; San Marcos E. L. & P. Co. *v.* Compton, 48 Tex. Civ. App. 586, 107 S. W. 1151. — ED.

DETZUR v. B. STROH BREWING CO.

SUPREME COURT OF MICHIGAN, 1899.

[*Reported* 119 *Mich.* 282.]

HOOKER, J. The plaintiff was injured by a piece of glass, which fell from a window of the defendant's building, cutting her arm severely, and permanently impairing its use, according to some of the testimony in the case. There is testimony upon the part of the plaintiff tending to show that a round window in the upper story was broken for some days or weeks before the accident, and that it was a piece of glass from this window which injured the plaintiff. The defendant offered testimony tending to show that there was no broken window in the building on the day before the accident, and that the glass causing the injury came from a square window, in a lower story, and its fall was caused by a high wind blowing at the time. The theory of the only count relied upon is that the defendant created and maintained a nuisance, in an insecurely fastened and broken window sash and glass, whereby the plaintiff was injured. A verdict of $10,000 was rendered in behalf of the plaintiff. A motion being made for a new trial, the court denied the same, upon condition that the plaintiff remit the sum of $6,500 from the verdict, which was done. The defendant has brought error.

Error was assigned upon the refusal of the court to charge the jury that there was no evidence of negligence. It is urged that it cannot be inferred from the mere fact that there was an accident. There is testimony tending to prove that there was a broken window; that, immediately before the accident, a window or glass was heard rattling, and the witness looked up, and saw triangular pieces of glass falling from the window, which she had previously seen in a broken condition; that several pieces fell to the sidewalk; and that it was a pleasant day, with but little wind. The window was 50 or 60 feet from the ground, in a building that stood but a few feet from the street. If it is true that a pane of glass was shivered, as, we think, there was some testimony tending to show, we cannot say that a jury could not legitimately find that it was negligence to leave it in that condition until the action of the elements loosened it, and caused it to fall. It is true that, where there is no evidence suggestive of a negligent cause, no recovery should be allowed upon a charge of negligence; but this is not such a case. Circumstances consistent with the plaintiff's theory are found in the case, and offer a reasonable opportunity for the inference that the injury resulted from a careless disregard of the broken and loosened condition of glass in a window above a street where pedestrians were frequently passing.

Counsel say that it is common knowledge that there is nothing dangerous in itself in a broken windowpane. We know that it is common to see cracked and broken windows, and we recognize the fact

that some of them are considered safe; but others are sometimes seen which are so palpably unsafe, because of the apparent danger of the pieces falling or being shaken out when the sash is shaken by wind or otherwise, that they may well be considered dangerous. As we cannot say that all cracked windows are safe, we must submit the question to the jury, when the testimony tends to show a condition of the window indicating danger.

In this connection we will mention the question of proximate cause. Counsel contend that, if the glass fell by means of its being dislodged by the wind, the negligence of the defendant was not the proximate cause of the injury, and they complain of a refusal to instruct the jury that in such event the plaintiff should not be allowed to recover. The negligence complained of is the maintenance of a window in such a condition that the glass was liable to fall out; not necessarily from its own weight, but under the natural conditions and strain to which it was likely to be subjected. It might not be negligent to leave a broken pane, if assurance could be given that it would be undisturbed by wind or by use. But wind is an everyday occurrence. It is a condition, not necessarily a cause, and one which should be taken into consideration before determining that a broken glass is not likely to fall. The wind may have been a concurring circumstance, but it cannot be said to have been the proximate cause, and the broken glass the remote cause. It cannot be true that a defendant who is liable if a defective glass falls from its own weight on a quiet day is to be relieved from responsibility because its fall is due to the pressure of a wind which should have been anticipated.[1]

DUBUQUE WOOD AND COAL ASSOCIATION *v.* DUBUQUE.

SUPREME COURT OF IOWA, 1870.

[*Reported* 30 *Ia.* 176.]

ACTION at law. The petition avers, that, prior to the date when plaintiff's cause of action accrued, there had been erected and maintained a bridge on Seventh street in the city of Dubuque over a slough of the Mississippi river; that Seventh street was a highway leading from the business portion of the city to the levee upon the river, and, as such, was used by the public; that said bridge was a county bridge, and it was the duty of the city as well as the county to rebuild it after it became impassable: that before the bridge became impassable, a large quantity of wood being deposited upon the levee, as was customary, was purchased by plaintiffs for the purpose of reselling to its customers in the city of Dubuque; that the levee was liable to

[1] The remainder of the opinion is omitted. See Webster *v.* Rome W. & O. R. R., 115 N. Y. 112, 21 N. E. 725. — ED.

be overflowed by the river, and the street upon which the bridge in question was erected was the only way over which the wood could have been transported to plaintiff's customers. On account of the bridge becoming impassable, and of the negligence of defendants, in failing to rebuild it, plaintiff was unable to remove his wood. Subsequently, but prior to any repairs made upon the bridge, the wood was lost by a flood in the river. The defendants provided no other bridge or way, while the bridge in question was unfit for use, by which plaintiff could have removed the wood.

The defendants separately demurred to the petition, alleging that it exhibited no cause of action, and each claiming not to be liable upon the state of facts set out in the petition. The demurrers were sustained and plaintiff appeals.

BECK, J. It is not denied, by the appellees, that the injury complained of will support an action, unless the injury appears to be public in its nature, and the damage claimed too remote, under the rules of the law, to become the basis of a compensatory judgment. The liability of the county and city for damage, the direct and certain result of negligence in failing to repair a highway, when that duty is imposed upon them, is not questioned by the counsel of appellees.

The questions presented for our determination, in this case, are these: 1. Are the injuries set out in the petition, as the foundation of the action, of such a public nature, being shared by plaintiff with the public generally, that recovery therefor is precluded? 2. Is the damage claimed so remote that compensation, under the rules of the law, will not be given? 3. If the action can be maintained, may recovery be had against both of the defendants? If not against both, which one is liable? No other points are presented in the argument of counsel for our decision.

As our conclusions upon the second point above stated are decisive of the case, it will be unnecessary to examine the others.

The rule limiting the recovery of damage to "the natural and proximate consequence of the act complained of" is universally admitted, and the extreme difficulty in its practical application is quite as widely conceded. The difficulty results not from any defect in the rule, but in applying a principle, stated in such general language, to cases of diverse facts. The dividing line between proximate and remote damages is so indistinct, if not often quite invisible, that there is, on either side, a vast field of doubtful and disputed ground. In exploring this ground there is to be had but little aid from the light of adjudicated cases. The course followed in each case, which is declared to be upon one side or the other of the dividing line, is plainly marked out, but no undisputed landmarks are established by which the dividing line itself may be precisely traced. As so little aid is derived from precedents in arriving at the conclusion we have reached, it would prove quite useless to refer to them.

Damage to be recoverable must be the proximate consequence of the act complained of; that is, it must be the consequence that follows the act, and not the secondary result from the first consequence, either alone or in combination with other circumstances.

An illustration will serve the purpose of more clearly expressing the principle. An owner of lumber deposited upon the levee of the city of Dubuque, exposed to the floods of the river, starts with his team to remove it. A bridge built by the city which he attempts to cross, from defects therein falls, and his horses are killed. By the breaking of the bridge and the loss of his team, he is delayed in removing his property. On account of this delay his lumber is carried away by the flood and lost. The proximate consequence of the negligence of the city is the loss of his horses. The secondary consequence, resulting from the first consequence, is the delay in removing the lumber, which, finally, caused its loss. Damage on account of the first is recoverable, but for the second, is denied.

Applying these principles to the case before us, we conclude that the losses for which recovery is sought were not the proximate consequence of the negligence of defendants complained of in the petition. The proximate consequence of the bridge of defendants becoming impassable was not the loss of plaintiff's wood. The loss resulted from the flood. It does not appear from the petition that the negligence of defendants in failing to repair the bridge, whereby plaintiff was prevented removing the wood, exposed plaintiff to any other loss. All that can be said is, that defendant's negligence caused plaintiff to delay removing the wood; the delay exposed the wood to the flood, whereby it was lost. Plaintiff's damage, then, was not the proximate consequence of the acts of defendant complained of, but resulting from a remote consequence joined with another circumstance, the flood. The case is not distinguishable from the supposed case above stated.

In our opinion the demurrer was correctly sustained. The other points raised in the case need not be noticed.

Affirmed.

BENEDICT PINEAPPLE CO. *v.* ATLANTIC COAST LINE RAILROAD CO.

SUPREME COURT OF FLORIDA, 1908. 32 Fla 2nd

[*Reported* 55 *Fla.* 514.]

WHITFIELD, J.[1] The main questions presented are whether the negligent burning of a canvas cover used to protect growing pineapple plants and fruit from injury by cold and frost is a proximate cause

[1] Part of the opinion is omitted. — ED.

of injury by cold and frost to the growing plants and fruit before the burned cover could by reasonable diligence be restored, so as to give the owner a right to recover damages for the injury to the plants and fruit by cold and frost; and whether the declaration sufficiently states that the alleged negligent act or omission of the defendant, whereby fires escaped from a passing locomotive, setting fire to the cover, and burned it, is a proximate cause of the injury to the growing plants and fruit from frost and cold.

The defendant railroad company had a right to run its engine and train over its tracks, but such right is coupled with the duty to so operate the engine as not to negligently injure the property of others near the track. The duty arises by implication of law out of the relation of the parties to each other and the circumstances of the case.

To entitle a party to recover damages for his property injured or destroyed through or by the negligent act or omission of another, the negligence complained of must be shown to have been a proximate cause of the injury. Jacksonville, T. & K. W. Ry. Co. *v.* Peninsular Land, Transp. & Mfg. Co., 27 Fla. 1, 9 South. 661, 17 L. R. A. 33.

Negligence is a proximate cause of an injury when in ordinary, natural sequence it causes, or contributes to causing, the injury, without an intervening independent cause.

The negligent act or omission for which a party is liable in damages is one that proximately, *i. e.*, in ordinary, natural sequence, causes, or contributes to causing, an injury to another, where no independent efficient cause of the injury intervenes, and the injured party is not at fault.

A negligent act or omission may be the proximate cause of injury, whether such injury necessarily or immediately follows the negligence or not, if the negligence is in ordinary natural, unbroken sequence the cause of the injury. Shearman & Redfield on Neg. § 26; Milwaukee & St. Paul Ry. Co. *v.* Kellogg, 94 U. S. 469, 24 L. ed. 256.

Liability for negligence extends to all its natural, probable, and ordinary results. Any injury that under the circumstances is the natural, probable, and ordinary result of a negligent act or omission is in law held to have been contemplated by the negligent party as a probable and proximate result of the negligence, when he is informed, or by ordinary observation would have been informed, of the facts and circumstances attending the negligence.

Results that follow in ordinary, natural, continuous sequence from a negligent act or omission, and are not produced by an independent efficient cause, are proximate results of the negligence, and for such results the negligent party is liable in damages, even though the particular results that did follow were not foreseen.

Where the injury is caused by the intervention of an independent efficient cause to which the defendant did not contribute and for which he is not responsible, or is caused by the act or omission of the plaintiff,

the negligence of the defendant is not the proximate cause of the injury. If the plaintiff contributes proximately to causing the injury, he cannot recover, unless otherwise provided by statute.

The ordinary conditions or forces of nature, such as ordinary wind, cold, heat, and the like, that are usual at the time and place and under the circumstances, and that reasonably should have been expected or foreseen as probable to occur, are not, in general, independent, efficient causes, when they affect or operate upon a negligent act or omission in causing a result. Those who are negligent are held in law to know the usual effect of ordinary natural conditions and forces upon a negligent act or omission, and to have contemplated the appearance and the effect of such conditions and forces upon their negligence or upon its proximate results, and to be liable in damages for the natural and probable proximate results of the negligence. 13 Am. & Eng. Ency. Law (2d ed.) 457 *et seq.*; 1 Thompson on Neg. 136; Wharton on Neg. § 97.

If the natural condition or force that affects the negligent act or omission is unusual or extraordinary, the negligent party will not, in general, be held to have known of or contemplated it, unless the circumstances of the particular negligent act or omission are such that the negligent party should have known of or contemplated the probable appearance and effect of such unusual or extraordinary natural condition or force. If the injury was caused by some extraordinary or unusual natural force or condition that could not have been foreseen, or that would have caused the injury if there had been no negligence, the negligence is not the proximate cause of the injury.

Where the injury complained of is the result of the negligence of the defendant and of some other contributing cause not an independent efficient cause, and the result could not have been produced in the absence of either contributing cause, the defendant's negligence is a proximate cause of the injury, if, under the circumstances attending the defendant's negligence, the injury was a probable, natural, and usual result of the two contributing causes that the defendant is held to have contemplated, and the plaintiff or those for whom he is responsible did not contribute proximately to the injury. Jacksonville, T. & K. W. Ry. Co. *v.* Peninsular Land, Transp. & Mfg. Co., 27 Fla. 1, 9 South. 661, 17 L. R. A. 33; Moore *v.* Lanier, 52 Fla. 353, 42 South. 462.

Where a negligent act or omission is a proximate cause of an injury, the negligent party is liable in damages for the usual and natural consequences of the injury, whether the particular consequences that followed the negligence were actually contemplated or not. For such losses as necessarily follow the injury as the result of the negligence, recovery may be had under a claim for general damages. Losses that are the natural and proximate, but not the necessary, result of the injury, may be recovered as special damages when sufficiently

stated and claimed. Jacksonville Electric Co. *v.* Batchis, 54 Fla.——, 44 South. 933.

If, by a wind that is ordinarily likely to occur, a fire, started by the negligence of a railroad company, is communicated to and destroys property of another, the company is liable in damages for the property so destroyed, since it is held to have contemplated all the natural and ordinary consequences of the negligence. Jacksonville, T. & K. W. Ry. Co. *v.* Peninsular Land, Transp. & Mfg. Co., 27 Fla. 1, 9 South. 661, 17 L. R. A. 33; Florida East Coast Ry. Co. *v.* Welch (Fla.) 44 South. 250.

Where a railroad company allows water from its tank to run upon the premises of another in the winter season, and the water subsequently freezes and injures property on such premises, the company is liable in damages for the injury, since the negligent escape of the water from the tank in ordinary, natural sequence caused a result that under the circumstances should have been expected. The negligence of the company in permitting the water to run on the premises was the proximate cause of the injury to the property from the freezing of the water. Chicago & Northwestern Ry. Co. *v.* Hoag, 90 Ill. 339.

Where a means such as a fence or a cover, or the like, has been provided by the owner of property to protect it from an injury that will probably occur, and such means are, without the fault of the owner, injured or destroyed by the negligent act or omission of another, who under the circumstances of the case knew, or should have known, of the use to which the means was applied and of the injury that would probably result from the destruction of such means, damages may be recovered for injuries to the property that was so protected, which proximately follow or result from the destruction of the means provided for the protection of the property injured. Garrett *v.* Sewell, 108 Ala. 521, 18 South. 737; Krebs Mfg. Co. *v.* Brown, 108 Ala. 508, 18 South. 659, 54 Am. St. Rep. 188; Miller *v.* St. Louis, I. M. & S. Ry. Co., 90 Mo. 389, 2 S. W. 439.

The declaration alleges that the defendant so carelessly and negligently managed and operated one of its locomotives that fire escaped therefrom and set fire to and burned the canvas or cloth covering to a pinery of growing plants "situated near to the track of the defendant."

Owners of property have a right to use it in any manner desired that is not inconsistent with the rights of others. This includes the right of those having land near a railroad track to place a canvas cover over plants growing on the land, and the mere fact that the cover is within the reach of sparks of fire emitted from a locomotive engine passing on the track near by does not relieve the railroad company from liability for its negligence in permitting the sparks to escape and burn the cover. While those having property are charged with the duty of caring for it, there is no obligation to constantly guard and pro-

tect it from injury by the negligence of others. See Jacksonville, T. & K. W. Ry. Co. *v.* Peninsular Land, Transp. & Mfg. Co., 27 Fla. 1, 9 South. 661, 17 L. R. A. 33.

It is alleged that the canvas cover placed over growing pineapple plants and fruits to protect them from injury by cold and frost was destroyed by the negligence of the defendant, who should have known the use of the cover and the protection it afforded, and that, because of the destruction of the cover, a cold and frost that ordinarily should have been expected as likely to occur at the time and place did occur and injured the plants and fruit without the fault of the plaintiff.

If the negligent burning of the canvas cover to the growing pineapple plants and fruit defeated the sole object for which the cover was used, and such negligent burning of the cover in ordinary, natural sequence caused the injury to the growing plants and fruit by cold and frost that under the circumstances should have been expected as likely to occur and injure the plants at the time and place of the negligent burning of the cover, such negligent burning was the proximate cause of the injury to the growing plants and fruit from cold and frost.

Injury to growing pineapple plants and fruit by ordinary cold and frost that should have been expected as likely to occur is not such an act of God as will relieve from liability for such injury a railroad company that negligently burned the cover over the plants and fruit, which cover was used solely to protect the plants and fruit and would have prevented the injury. See Norris *v.* Savannah, F. & W. Ry. Co., 23 Fla. 182, 1 South. 475, 11 Am. St. Rep. 355; Texas & P. Ry. *v.* Coggin & Dunaway (Tex. Civ. App.) 99 S. W. 1052.

If the injury would not have resulted from the cold and frost, but for the negligent burning of the cover, the defendant is liable, as such negligence made effective and injurious an ordinary natural condition that should have been contemplated and that would otherwise have been harmless.

Under the allegations of the declaration, the negligent burning of the cover was a primary and efficient act that in ordinary, natural sequence caused the injury to the growing plants and fruit by cold and frost; such injury not being the result of an intervening independent efficient cause, or of an extraordinary or unusual frost and cold that could not have been foreseen, or that would have injured the plants if the cover had not been burned by the negligence of the defendant. If this is proved, the plaintiff may recover damages for the injury.

The count of the original declaration upon which recovery was had was held to be "fatally defective in not alleging negligence, either of commission or omission, on the part of the defendant in communicating the fire" to the canvas cover, and also in not alleging facts "sufficient to bring home to the defendant that the burning might

reasonably have been expected to result directly and naturally in damage to the plants and fruit by cold and frost." Atlantic Coast Line Ry. Co. *v.* Benedict Pineapple Co., 52 Fla. 165, 42 South. 529.

Where negligence is the basis of recovery, the declaration should contain allegations of the negligent act or omission of the defendant, and also allegations of facts to show injury to the plaintiff, and that such injury was a proximate result of the negligence alleged.

The declaration now in the first count alleges that the defendant "so carelessly and negligently managed and operated one of its locomotives while drawing a train of cars . . . that fire escaped from said locomotive and set fire to the canvas or cloth with which a pinery belonging to the plaintiff and situated near to the track of the defendant . . . was covered, and burned a large part, to wit, about one acre, of the said cover." This is a sufficient allegation of a negligent act of the defendant in communicating fire to the canvas cover, and of injury resulting proximately therefrom to the plaintiff when taken with the claim for damages, to authorize a recovery of general damages or such as naturally and necessarily result from the burning of the canvas cover to the extent of its value.

As special damages resulting from the negligent act alleged, the first count further states: "That, in the said pinery, a large number of pineapple plants and fruit were growing and were likely to be damaged by frost and cold in the" stated vicinity and "the latitude thereof in the winter season, and that it was usual and customary in and about the said" vicinity "and latitude to cover pineries with canvas or cloth in order to protect the plants and fruit growing therein from damages by frost and cold," and to keep in the heat supplied by fires maintained in the pineries during spells of frost and cold which ordinarily come in the winter season on short notice and would otherwise damage the plants and fruit; that, in accordance with said custom, plaintiff provided said pinery with a good canvas or cloth cover, and also provided stoves and fuel therein, ready and sufficient within the covered pinery to heat the same immediately upon the coming of frost and cold dangerous to the plants and fruit, and thus preserve them from damage therefrom; "that shortly after the burning of the portion of the cover as aforesaid, and before the plaintiff by exercise of any reasonable diligence by it could replace the part of the cover which had been burned through the negligence of the defendant as aforesaid, the plants and fruit were damaged by frost and cold for want of the complete cover and the subsequent inability of the plaintiff to control the temperature within said pinery; that the defendant well knew, or ought to have known," of the custom, conditions, and circumstances alleged; and that the "damage was caused by the negligence of the defendant in burning part of the cover as aforesaid." Damages are claimed in $10,000.

As the defendant is liable for such injurious results as were likely

to and did naturally and proximately follow its negligence, it was not necessary to allege, as contended, "that at the time of the occurrence of the fire the weather was such that cold or frost could be anticipated by the defendant," or "that in the month of January cold or frost of such character as to damage pineapple plants ordinarily occurred." That the month of January, when the fire occurred, was "in the winter season," the court knows judicially, and there are allegations that pineapple plants and fruit are likely to be damaged by frost and cold in the vicinity stated in the winter season, that it was usual and customary there to cover the growing plants with canvas to protect them from damage by frost and cold, and that the defendant knew, or should have known, of all the circumstances alleged. If the frost or cold of any degree injured the plants or fruit under the circumstances alleged, as the proximate result of the defendant's negligence, it is not necessary to state the extent of the frost or cold necessary to the damage, or that such frost or cold was likely to come at the time the fire occurred, because of the then condition of the weather, as is insisted by the defendant in error.

If the defendant was negligent in burning the cover, it cannot be relieved from liability for the proximate results of such negligence on the ground that an ordinary natural condition, *i. e.*, frost and cold, intervened, when such ordinary cold and frost should have been expected as probably to occur at the time and place of the negligence.

The declaration in effect alleges that the cold which injured the plants should, under the circumstances, have been contemplated by the defendant as likely to occur, that the injury was the natural result of the cold, and that such injury would not have resulted but for the negligence of the defendant that caused the fire to destroy the covering to the plants. The demurrer admits this. It is in effect alleged that by ordinary, natural sequence the negligence of the defendant in starting the fire burned the covering, thereby exposing the growing plants and fruit to an injurious cold and frost that under the circumstances stated should have been expected as likely to occur, and the plants and fruit were injured by such cold and frost without the fault of the plaintiff, because the covering was destroyed by the fire started by defendant's negligence. It is sufficiently alleged that the negligence of the defendant was the proximate cause of the injury to the plants and fruit by cold and frost.

The cold that injured the plants was not an independent efficient cause occurring between the negligence of the defendant and the injury by cold and frost, as such injury was the natural and ordinary result of cold and frost that it is alleged should have been expected as likely to occur as an ordinary or usual natural condition that would not have been harmful to the plants if the covering had not been destroyed by the fire negligently started by the defendant.[1]

[1] See also Williams v. Atlantic Coast Line R. R., 56 Fla. 735, 48 So. 209.— ED.

DENNY v. NEW YORK CENTRAL RAILOAD CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1859.

[3 *Gray*, 481.]

MERRICK, J. This action is brought to recover compensation for damages alleged to have been sustained by the plaintiff in consequence of an injury to a quantity of his wool delivered to the defendants to be transported for him from Suspension Bridge to Albany. It appears from the report that the wool, directed to Boston, was received by them at the former, and carried to the latter place, and was there safely deposited in their freight depot. But it was not transported seasonably nor with reasonable dispatch. By their failure to exercise the degree of care and diligence required of them by law, it was detained six days at Syracuse, and consequently arrived at Albany so many days later than it should regularly have been there. Whilst it was lying in the defendant's freight depot in that city, it was submerged by a sudden and violent flood in the Hudson River. This rise of the water caused the alleged injury to the wool.

Upon the evidence adduced by the parties at the trial, three questions of fact were submitted to the determination of the jury. It is necessary now to advert only to the first of those questions; for the finding of the jury in relation to the second was in favor of the defendants, and the verdict in relation to the third has on their motion been already set aside as having been rendered against the weight of evidence in the case.

In looking at the terms and language in which the action of the jury in reference to the first of these questions is expressed, it would perhaps, at first sight, seem that they had passed upon and determined the precise point in issue between the parties, namely, whether the wool was injured by reason of an omission on the part of the defendants to exercise the care and diligence in the transportation of the wool, which the law required of them as common carriers. If this were so, it would have been a final and conclusive determination. But upon a closer scrutiny of the statements in the report, it appears that the jury, by their answer to the question submitted to them, intended only to affirm, that the defendants failed to exercise due care and diligence in the prompt and seasonable transportation of the wool, and that by reason of this failure and the consequent detention of the wool at Syracuse it was injured by the rise of water in the Hudson, and thereby sustained damage to which it would not have been exposed if it had arrived at Albany as soon as it should have done, because in that event it would have been taken away from the defendants' freight depot, and carried forward to Boston before the occurrence of the flood. And it was upon this ground that the verdict was rendered for the plaintiff. This was so considered by both parties in their arguments upon the questions of law arising upon the report.

It is therefore now to be determined by the court, whether the defendants are, by reason and in consequence of their negligence in the prompt and seasonable transportation of the wool, responsible for the injury which it sustained after it was safely deposited in their depot at Albany. And we think it is very plain that, upon the well settled principles of law applicable to the subject, they are not.

It is said to be an ancient and universal rule resting upon obvious reason and justice, that a wrongdoer shall be held responsible only for the proximate and not for the remote consequences of his actions. 2 Parsons on Con. 456. The rule is not limited to cases in which special damages arise; but is applicable to every case in which damage results from a contract violated or an injurious act committed. 2 Greenl. Ev. § 256. 2 Parsons on Con. 457. And the liabilities of common carriers, like persons in other occupations and pursuits, are regulated and governed by it. Story on Bailments, 586. Angell on Carriers, 201. Morrison v. Davis, 20 Penn. State R. 171.

In the last named case, it is said that there is nothing in the policy of the law relating to common carriers, that calls for any different rule, as to consequential damages, to be applied to them. In that case may be found not only a clear and satisfactory statement of the law upon the subject, but a significant illustration of the rule which the decision recognizes and affirms. It was an action against the defendants, as common carriers upon the Pennsylvania Canal. It appeared that their canal boat, in which the plaintiff's goods were carried, was wrecked below Piper's Dam, by reason of an extraordinary flood; that the boat started on its voyage with a lame horse, and by reason thereof great delay was occasioned in the transportation of the goods; and that, had it not been for this, the boat would have passed the point where the accident occurred, before the flood came, and would have arrived in time and safety at its destination. The plaintiff insisted that, inasmuch as the negligence of the defendants in using a lame horse for the voyage occasioned the loss, they were therefore liable for it. But the court, assuming that the flood was the proximate cause of the disaster, held, that the lameness of the horse, by reason of which the boat, in consequence of his inability thereby to carry it forward with the usual and ordinary speed, was exposed to the influence and dangers of the flood, was too remote to make the defendants responsible for the goods which were lost in the wreck. It was only, in connection with other incidents, a cause of the final, direct and proximate cause by which the damages sought to be recovered were immediately occasioned.

There is so great a resemblance between the circumstances upon which the determination in that case was made, and those upon which the question under consideration in this arises, that the decision in both ought to be the same. In this case, the defendants failed to exercise due care and diligence, in not being possessed of a sufficient number of efficient working engines to transport the plaintiff's wool with the usual, ordinary and reasonable speed. The consequence of this fail-

ure on their part was that the wool was detained six days at Syracuse. This was the full and entire effect of their negligence, and for this they are clearly responsible. But in all that occurred afterwards there was no failure in the performance of their duty. There was no delay and no negligence in any part of the transportation between Syracuse and Albany, and upon reaching the latter place the wool was safely and properly stored in their freight depot. It was their duty to make this disposition of it. They had then reached the terminus of their road; the carriage of the goods was then complete; and the duty only remained of making delivery. The deposit of the wool in the depot was the only delivery which they were required to make; and having made that, their liabilities as carriers thenceforward ceased. It was there to be received by the owner, or taken up by the proprietors of the railroad next in course of the route to Boston. Norway Plains Co. *v.* Boston & Maine Railroad, 1 Gray, 263. Nutting *v.* Connecticut River Railroad, 1 Gray, 502. The rise of waters in the Hudson, which did the mischief to the wool, occurred at a period subsequent to this, and consequently was the direct and proximate cause to which that mischief is to be attributed. The negligence of the defendants was remote; it had ceased to operate as an active, efficient and prevailing cause as soon as the wool had been carried on beyond Syracuse, and cannot therefore subject them to responsibility for an injury to the plaintiff's property, resulting from a subsequent inevitable accident which was the proximate cause by which it was produced. It is to the latter only to which the loss sustained by him is attributable.

It follows from these considerations, that the verdict in the plaintiff's behalf must be set aside, and a new trial be had; in which he will recover such damages as he proves were the direct consequence of the negligence of which the defendants may be shown to have been guilty.

New trial ordered.

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FOX *v.* BOSTON AND MAINE RAILROAD CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1889.

[148 *Mass.* 220.]

MORTON, C. J. The plaintiff offered to prove that on February 22, 1881, he made a special contract with the defendant, by the terms of which it was to transport a car-load of apples from Haverhill to Portland, and deliver it to the Maine Central Railroad, a connecting railroad, in time to be transported by the latter corporation to Bangor by a freight train which left Portland early in the morning of February 23; that the weather was mild on the 22d and 23d days of February, and that "the agreement with the defendant was made with reference to the mildness of the weather, and the importance of having the apples delivered to the Maine Central Railroad at the agreed time"; that the defendant negligently delayed to deliver the apples at the time

agreed, and by reason of this negligence they "were caught in cold weather in course of transportation from Portland to Bangor, arriving at the latter place in a frozen condition." The presiding judge ruled that, "if the market value of the apples when they reached Portland was only diminished in the respect that a liability of being frozen during the course of the transportation by the Maine Central Railroad was incurred or increased by reason of the negligent delay of the defendant in the transportation from Haverhill to Portland, the plaintiff cannot recover in this action for that diminution in market value." If we understand this ruling, its effect was to restrict the plaintiff's right to recover to the diminution in the market value of the apples at Portland caused by the delay, and to prevent his recovering anything for the damage to the apples by freezing in the transportation from Portland to Bangor.

The general rule is, that where goods are delivered in the usual way to a carrier for transportation, and there is a negligent delay in delivering them, the measure of damage is the diminution in the market value of the goods between the time when they ought to have been delivered and the time when they were in fact delivered. Ingledew *v.* Northern Railroad, 7 Gray, 86. Cutting *v.* Grand Trunk Railway, 13 Allen, 381. Scott *v.* Boston & New Orleans Steamship Co., 106 Mass. 468. Harvey *v.* Connecticut & Passumpsic Rivers Railroad, 124 Mass. 421. These cases are put upon the ground that the duty of the carrier is the measure of his liability; that his duty is to carry the goods to the end of his line, and that any future risks to which the goods may be exposed are not within the contemplation of the parties or the scope of their contract. But we think a different rule prevails where the parties make a special contract, which provides for certain risks to which the goods are exposed on the connecting line.

Thus, in the case before us, the parties made a special contract, by which the defendant agreed to deliver the apples to the Maine Central Railroad by a fixed time, so that they would arrive in Bangor in the afternoon of February 23. Both parties knew that the apples were not to be sold in Portland, but were to be forwarded to Bangor, and the special contract was made for the purpose of avoiding the danger of the apples freezing on the connecting line. This risk was anticipated and contemplated by the parties, and if the danger which it was intended to provide against was incurred by reason of the negligent failure of the defendant to perform its contract, it ought to be responsible in damages. The damages are not too remote. If the freezing had occurred on the defendant's line, it cannot be doubted that the law would regard the delay as the proximate cause of the damage; it is none the less so, because it happened on a connecting line. The damage was not caused by any extraordinary event subsequently occurring, but was caused by an event which was, according to the common experience, naturally and reasonably to be expected, a change of temperature.

The case is thus distinguished from the cases of Denny *v.* New York Central Railroad, 13 Gray, 481, and Hoadley *v.* Northern Transportation Co., 115 Mass. 304. In each of these cases, the loss to the plaintiff was caused by an extraordinary event, a fire and a freshet; and the court held that the defendants, although guilty of negligent delay, were not responsible, because the event was not one which would reasonably be anticipated. In the case at bar, the event which caused the loss was contemplated by the parties when they made their contract as a probable consequence of the breach of it.

The case before us is distinguishable from Ingledew *v.* Northern Railroad, 7 Gray, 86. In that case the opinion is based upon the ground, that it did not appear that "the defendants assumed any duty in relation to the delivery of the boxes to another carrier," or that they "were charged with any duty in forwarding the ink to Keene, or that the officers of the defendant corporation knew of its destination beyond their own line." The facts of the two cases are different, and for the reasons above stated we are of opinion that different rules of damages are to be applied in them, and that in the case at bar, upon the facts which he offered to prove, the plaintiff is entitled to recover the damage which he sustained by reason of the freezing of the apples between Portland and Bangor. *Exceptions sustained.*

GREEN-WHEELER SHOE CO. *v.* CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY CO.

SUPREME COURT OF IOWA, 1906.

[130 *Ia.* 123.]

McCLAIN, C. J. In the agreed statement on which the case was tried without other evidence being introduced it is stipulated that the defendant was guilty of negligent delay in the forwarding of the goods of plaintiff from Ft. Dodge to Kansas City, where they were lost or injured on May 30, 1903, by a flood which was so unusual and extraordinary as to constitute an act of God, and that if there had been no such negligent delay the goods would not have been caught in the flood referred to or damaged thereby.

We have presented for our consideration, therefore, the simple question whether a carrier who by a negligent delay in transporting goods has subjected them, in the course of transportation, to a peril which has caused their damage or destruction, and for the consequence of which the carrier would not have been liable had there been no negligent delay intervening, is liable for the loss.

On this question there is a well-recognized conflict in the authorities. In several well-considered cases decided by courts of high authority it was decided, while the question was still new, that the negligent delay of the carrier in transportation could not be regarded as the proximate

cause of an ultimate loss by a casualty which in itself constituted an act of God, as that term is used in defining the carrier's exemption from liability, although had the goods been transported with reasonable diligence they would not have been subjected to such casualty, and these cases are very similar to the one before us inasmuch as the loss in each instance was due to the goods being overtaken by an unprecedented flood for the consequence of which the carrier would not be responsible. Morrison *v.* Davis, 20 Pa. 171 (57 Am. Dec. 695); Denny *v.* New York Cent. R. Co., 13 Gray (Mass.), 481 (74 Am. Dec. 645); Railroad Co. *v.* Reeves, 10 Wall. 176 (19 L. Ed. 909); Daniels *v.* Ballantine, 23 Ohio St. 532 (13 Am. Rep. 264); Hunt *v.* Missouri, K. & T. R. Co. (Tex. Civ. App.), 74 S. W. 69; Gleeson *v.* Virginia Midland R. Co., 5 Mackey (D. C.), 356. These cases are predicated upon the view that if the carrier could not reasonably have foreseen or anticipated that the goods would be overtaken by such a casualty as a natural and probable result of the delay, then the negligent delay was not the proximate cause of the loss, and should be disregarded in determining the liability for such loss. A similar course of reasoning has been applied in other cases, where the loss has been due immediately to some cause such as accidental fire involving no negligence on the part of the carrier and within a valid exception in the bill of lading, but the goods have been brought within the peril stipulated against by negligent delay in transportation. Hoadley *v.* Northern Trans. Co., 115 Mass. 304 (15 Am. Rep. 106); Yazoo & M. V. R. Co. *v.* Millsaps, 76 Miss. 855 (25 South. 672, 71 Am. St. Rep. 543); General Fire Extinguisher Co. *v.* Carolina & N. W R. Co., 137 N. C. 278 (47 S. E. 208). For similar reasons it has been held that loss of or injury to the goods by reason of their inherent nature, as by freezing or the like, will not render the carrier liable, even after negligent delay in transportation, if such casualty could not have been foreseen or anticipated as the natural and probable consequence of such delay. Michigan Cent. R. Co. *v.* Burrows, 33 Mich. 6; Herring *v.* Chesapeake & W. R. Co., 101 Va. 778 (45 S. E. 322).

On the other hand, it was held by the Court of Appeals of New York in a case arising out of the same flood which caused the destruction of the goods involved in Denny *v.* New York Cent. R. Co., 13 Gray (Mass.), 481 (74 Am. Dec. 645), *supra*, that the preceding negligent delay on the part of the carrier, in consequence of which the goods were overtaken by the flood, was sufficient ground for holding the carrier to be liable for the loss. Michaels *v.* New York Cent. R. Co., 30 N. Y. 564 (86 Am. Dec. 415); Read *v.* Spaulding, 30 N. Y. 630 (86 Am. Dec. 426). And the same court has adhered to this view in case of a loss by fire covered by valid exception in the bill of lading. Condict *v.* Grand Trunk R. Co., 54 N. Y. 500. The Illinois Supreme Court has consistently followed the rule of the New York cases in holding that negligent delay subjecting the goods to loss by the Johnstown flood rendered the carrier liable (Wald *v.* Pittsburg,

C., C. & St. L. R. Co., 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332) and likewise that similar delay rendered the carrier liable for damage to the goods by freezing. Michigan Cent. R. Co. *v.* Curtis, 80 Ill. 324. The Alabama and Kentucky courts have held that a destruction by fire within a valid exception in the bill of lading would not excuse the carrier if by negligent delay in transportation the goods had been subjected to such casualty. Louisville & N. R. Co. *v.* Gidley, 119 Ala. 523 (24 South. 753); Hernsheim *v.* Newport News & M. V. Co., 18 Ky. Law Rep. 227 (35 S. W. 1115). In Missouri the Supreme Court has followed or approved of what may be designated as the New York rule, under a variety of circumstances. Davis *v.* Wabash, St. L. & P. R. Co., 89 Mo. 340 (1 S. W. 327); Pruitt *v.* Hannibal & St. J. R. Co., 62 Mo. 527; Read *v.* St. Louis, K. C. & N. R. Co., 60 Mo. 199. And the St. Louis Court of Appeals in that State has applied the same rule in case of a loss by freezing. Armentrout *v.* St. Louis, K. C. & N. R. Co., 1 Mo. App. 158. But the Kansas City Court of Appeals in a case of loss by flood has followed the Massachusetts and Pennsylvania cases. Moffatt Com. Co. *v.* Union Pac. R. Co. (Mo. App.), 88 S. W. 117. And the St. Louis Court of Appeals seems to have recently recognized the same rule. Grier *v.* St. Louis Merchants' Bridge Terminal R. Co., 108 Mo. App. 565 (84 S. W. 158). In West Virginia the Supreme Court has held that negligent delay renders the carrier liable for a subsequent loss by freezing. McGraw *v.* Baltimore & O. R. Co., 18 W. Va 361 (41 Am. Rep. 696). In Minnesota the court has recently reviewed the whole question in a case involving the loss of goods by the same flood which caused the loss for which the present suit is brought and has reached the conclusion that the previous negligent delay of the carrier which caused the goods to be subjected to the peril of the flood "concurred and mingled with the act of God" to such an extent that the carrier was precluded from relying upon the act of God as a defence. Bibb Broom Corn Co. *v.* Atchinson, T. & S. F. R. Co., 94 Minn. 269, 102 N. W. 709 (69 L. R. A. 509).

The irreconcilable conflict in the authorities is recognized by text-writers, and while the weight of general authority has in many cases been said to support the rule announced in the Massachusetts and Pennsylvania cases (1 Thompson, Negligence, section 74; Schouler, Bailments [Ed. 1905], section 348; Hale, Bailments and Carriers, 361; 6 Cyc. 382; notes 36 Am. St. Rep. 838), other authors prefer the New York rule (Hutchinson, Carriers [2d Ed.], section 200; Ray. Negligence of Imposed Duties, 177). In the absence of any express declaration of this court on the very point, and in view of the fact that in recent cases the conflict of authority is still recognized (see 5 Cur. Law, 517) it seems necessary that the reasons on which the two lines of cases are supported shall be considered in order that we may now reach a conclusion which shall be satisfactory to us.

Mere negligence will not render one person liable to another for a

loss which the latter would not have sustained had there been no such negligence, unless the negligence consists in some violation of a duty which the one person owes to the other. Dubuque Wood & Coal Ass'n *v.* City and County of Dubuque, 30 Iowa, 176; St. Louis, I. M. & S. R. Co. *v.* Commercial Ins. Co., 139 U. S. 223 (11 Sup. Ct. 554, 35 L. Ed. 154). And, on the other hand, it is well settled that if the negligence of one person with reference to the duty owed to another concurs with an accidental cause resulting in injury to another to whom such duty is owed the negligent person must answer for the consequences as though his negligence were the sole cause of the loss. Savannah, F. & W. R. Co. *v.* Commercial Guano Co., 103 Ga. 590 (30 S. E. 555); Thomas *v.* Lancaster Mills, 71 Fed. 481 (19 C. C. A. 88); New Brunswick Steamboat Co. *v.* Tiers, 24 N. J. Law, 697 (64 Am. Dec. 394); Tierney *v.* New York Cent. & H. R. R. Co., 76 N. Y. 305; Williams *v.* Grant, 1 Conn. 487 (7 Am. Dec. 235); 1 Thompson, Negligence, sections 68, 73.

The real difficulty seems to be in determining to what extent, if at all, it is necessary that the negligent party must have been able to foresee and anticipate the result of his negligent act in order to render him liable for the consequences thereof resulting from a concurrence of his negligence and another cause for which he is not responsible. In an action on contract the party who is at fault is only liable for such consequences as arise according to the usual course of things from his breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time the contract was made as the probable result of the breach. Hadley *v.* Baxendale, 9 Exch. 341; Sedgwick, Elements of Damage, 17. But in an action for tort, and the present action is of that character, recovery is not limited to the consequences within the contemplation of the parties or either of them, but includes all the consequences "resulting by ordinary natural sequence, whether foreseen by the wrongdoer or not, provided that the operation of the cause of action is not interrupted by the intervention of an independent agent or overpowering force, and that but for the operation of the cause of action the consequence would not have ensued." Sedgwick, Elements of Damage, section 54. It is true that for the purpose of determining whether the injury suffered by the party complaining was the natural and probable result of the wrong complained of a convenient test is to consider whether in general such a result might have been foreseen as the consequence of the wrong, but it is not necessary "that the injury in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been the natural and probable consequence." Hill *v.* Winsor, 118 Mass. 251; Schumaker *v.* St. Paul & D. R. Co., 46 Minn. 38 (48 N. W. 559, 12 L. R. A. 257). And see Railroad Co. *v.* Kellogg, 94 U. S. 469 (24 L. Ed. 256); McPeek *v.* Western Union Tel. Co., 107 Iowa, 356; Hoag *v.* Railroad Co., 85 Pa. 293 (27 Am. Rep. 653); Empire State Cattle Co. *v.* Atchison, T. & S. F. R. Co.

(C. C.), 135 Fed. 135; Chicago, St. P., M. & O. R. Co. *v.* Elliott, 55 Fed. 949 (5 C. C. A. 347, 20 L. R. A. 582); Miller *v.* St. Louis, I. M. & S. R. Co., 90 Mo. 389 (2 S. W. 439); Smith *v.* Railroad, L. R. 6 C. P. 21; 1 Thompson, Negligence, section 59.

Now, while it is true that defendant could not have anticipated this particular flood and could not have foreseen that its negligent delay in transportation would subject the goods to such a danger, yet it is now apparent that such delay did subject the goods to the danger, and that but for the delay they would not have been destroyed; and defendant should have foreseen, as any reasonable person could foresee, that the negligent delay would extend the time during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty, and would therefore increase the peril that the goods should be thus lost to the shipper. This consideration that the peril of accidental destruction is enhanced by the negligent extension of time during which the goods must remain in the carrier's control and out of the control of the owner, and during which some casualty may overtake them, has not, we think, been given sufficient consideration in the cases in which the carrier has been held not responsible for a loss for which he is not primarily liable, but which has overtaken the goods as a consequence of the preceding delay in their transportation.

It is not sufficient for the carrier to say by way of excuse that while a proper and diligent transportation of the goods would have kept them free from the peril by which they were in fact lost it might have subjected them to some other peril just as great. He cannot speculate on mere possibilities. A pertinent illustration is furnished by the well-settled rule with reference to deviation which is that if the carrier transports the goods over some other route than that specified in the contract or reasonably within the contemplation of the parties, he must answer for any loss or damage occurring during such deviation, although it is from a cause which would not in itself render him liable. In such a case it is said "that no wrongdoer can be allowed to apportion or qualify his own wrong, and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done." Davis *v.* Garrett, 6 Bing. 716. And see Merchants' D. Transp. Co. *v.* Kahn, 76 Ill. 520; Crosby *v.* Fitch, 12 Conn. 410 (31 Am. Dec. 745); U. S. Exp. Co. *v.* Kountze, 8 Wall. 342 (19 L. Ed. 457, 6 Cyc. 383). It is true that the analogy to the case of a deviation is denied by the courts which announce the rule of the Pennsylvania and Massachusetts cases but the distinction attempted to be made that a deviation amounts to a conversion rendering the carrier absolutely liable is too technical to be considered as persuasive. The analogy between the two classes of

cases has been recognized in Constable *v.* National Steamship Co., 154 U. S. 51 (14 Sup. Ct. 1062, 38 L. Ed. 903), and in Hutchinson, Carriers (2d Ed.), section 200.

This court has expressed itself in favor of the liability of the carrier in classes of cases very analogous to that of deviation. Where goods were shipped with the agreement that they should be carried to their destination without change of cars, and in violation of this contract the goods were unloaded at Chicago which was not their destination, for the purpose of transporting them in other cars, and they were destroyed by the Chicago fire, it was held that the carriers were liable although the loss by fire was within a valid exemption from liability contained in the bill of lading. Robinson *v.* Merchants' Dispatch Trans. Co., 45 Iowa, 470; Stewart *v.* Merchants' Dispatch Trans. Co., 47 Iowa, 229. Certainly the act of the carrier in unloading the goods at Chicago, instead of carrying them through to their destination in the cars in which they were originally loaded, would not amount even to a technical conversion, nor could it have been anticipated that the result of such an act would be the destruction of the goods; nevertheless this court reached the conclusion that such a departure from the terms of the contract rendered the carrier liable for a loss for which it would not have been liable had it resulted without such departure. We think that in principle these cases support the general proposition that the wrongful act of the carrier which in fact subjects the goods to loss renders him liable for such loss although the circumstances under which it occurred could not have been anticipated. This is plainly right, for the detention due to the transfer of the goods to the other cars did increase the hazard of fire; but it is equally true in the case before us that the negligent delay increased the hazard of the loss by flood. As supporting the same view we may also refer to Hewett *v.* Chicago, B. & Q. R. Co., 63 Iowa, 611, in which it was held that negligent delay in forwarding goods which were liable to damage by freezing rendered the carrier accountable for the loss thus resulting. In that case it is said that while the carrier is responsible for such damages only as are the proximate consequence of his own acts and is not accountable for such loss as is occasioned by the intervention of the *vis major*, yet "one of the undertakings of the common carrier is that he will not expose the property entrusted to his care to any improper hazards or extraordinary perils, and if, by his act or omission, it is exposed to perils or hazards which ordinary foresight could have apprehended and provided against, he is accountable for such injury as may be occasioned by such exposure." See, also, Whicher *v.* Steam Boat Ewing, 21 Iowa, 240.

We are satisfied that the sounder reasons, supported by good authority, require us to hold that in this case the carrier is liable for the loss of and damage to plaintiff's goods, and the judgment of the trial court is therefore *reversed.*

CHEEVES *v.* DANIELLY.

SUPREME COURT OF GEORGIA, 1887.

[*Reported* 80 *Ga.* 114.]

BLANDFORD, J. Danielly brought his action against Cheeves to recover damages, for and on account of Cheeves' having turned a portion of a stream of water known as Yellow creek from its natural flow, by digging a ditch from a point just opposite his (Cheeves') land on Yellow creek, to a point on Tobesofkee or Big creek, just opposite the plaintiff's land, thereby emptying the waters of Yellow creek into Tobesofkee or Big creek, and causing the latter to fill up with sand, or other obstructions, and raising the water of the creek so that the lands of the plaintiff were overflowed, causing him great injury and damage. The jury found a verdict in favor of the plaintiff in the court below. Cheeves moved for a new trial on several grounds; the motion was overruled, and Cheeves excepted.

1. The main ground of error assigned in the motion for a new trial, and the one which was chiefly relied on before us, was that the court refused to give in charge section 3072 of the code, which section is as follows: "If the damages are only the imaginary or possible result of the tortious act, or other and contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote to be the basis of recovery against the wrong-doer." The principles of law announced in this section of the code are very difficult of application to any particular case or given state of facts; and upon the question of their application judges of the same court and of the highest courts of this country have differed. To understand this section we think it is necessary that it should be construed together with other sections of the code immediately connected therewith. Sections 3071 and 3073 are as follows: "'Direct' damages are such as follow immediately upon the act done. 'Consequential' damages are such as are the necessary and connected effect of the tortious act, though to some extent depending upon other circumstances." "Damages which are the legal and natural result of the act done, though contingent to some extent, are not too remote to be recovered. But damages traceable to the act, but not its legal or material consequences, are too remote and contingent." If the act complained of, though it might in some degree contribute to the injury, is so small or of such character as would not of itself produce the injury, and is of itself an innocent act, and there are other and contingent circumstances which greatly proponderate in producing the injury, then the damages cannot be recovered. The throwing of a grain of sand into a creek would, to some extent, cause the creek to dam up, but it would not be appreciable; other and con-

tingent circumstances would be so great as to make whatever damage that small act might do merely imaginary or possible. If the act complained of produces directly the damage, however small that damage might be, then it can be the subject of recovery; for wherever there is a wrong there shall be a remedy. If the injury is produced from the act complained of, and can be traced to it directly, immediately, reasonably and probably, then a recovery can be had.

In this case, it appears from the evidence that Yellow creek was turned into Tobesofkee or Big creek opposite to Danielly's land by Cheeves; that it had never flowed into it at that place before, but that a portion of it flowed into it a mile or more below there; that shortly after this creek was turned in at the point opposite Danielly's land, the creek commenced filling up with sand, and overflowed his land; that it had never done so before; that Danielly's land thus became wet, and he was in consequence unable to make any crops upon it and thereby suffered damage. On the other side it was contended that beavers had got to working there, and that a mill-dam had broken above that point, which caused mud and sand to flow in, and that from the clearing of the lands opposite to Danielly's, sand had flowed in and filled up the creek. It may have been true that there were concurrent causes for the overflow of this creek; that the beavers dammed it up to some extent, and that the flowing in of the sand from adjacent land, and the breaking of the mill-dam above contributed in some degree to the injury; but the question was fairly submitted by the court to the jury, and the court left it with them to say whether the injury complained of was or was not traceable to the act of Cheeves,— whether his act reasonably and probably produced the injury or not; and the court further instructed them that if the damage was caused by the beavers, or the washing away of the dam above, or the flowing in of sand fron adjacent land, there could be no recovery by the plaintiff; but that if the act of the defendant caused the injury or any part of it,— if the injury was consequential upon it so that it could be traced to the act complained of, then the defendant was liable for any damage caused thereby. We think this is the law of the case; and we think that the court, under the facts of this case, did right to refuse to give in charge to the jury section 3072 of the code without more; because it is very manifest to our minds, from the evidence in the record, that the turning of Yellow creek into Tobesofkee or Big creek at a point opposite the lands of Danielly, caused some of this injury,— that the injury is directly traceable to a portion of it at least.

2. Again, if this act of Cheeves in turning Yellow creek into Tobesofkee creek put other causes in operation, if it started the beavers to work damming up the creek, Cheeves would be liable for the damage thereby resulting. Where a wrongful act puts other forces in operation, which are natural and which the act would reasonably and prob-

ably put in motion, the party guilty of the first efficient cause will be responsible in damages for the injury proved. So, if a man sets a house on fire, it is natural and reasonable that air will carry the flames to an adjacent house, and from house to house; and the person who wrongfully or negligently sets the house on fire is responsible for all that naturally, reasonably and legally, follows from his wrongful act, and can be traced thereto. If he puts natural forces in operation which produce injury to another, and which would not have been put in operation but by his wrongful act, he is responsible for it, and ought to be made liable for it.[1]

Judgment affirmed.

E. T. & H. K. IDE *v.* BOSTON & MAINE RAILROAD CO.

SUPREME COURT OF VERMONT, 1909.

[*Reported* 83 *Vt.* 66.]

HASELTON, J. This was an action brought by the plaintiff, a corporation, to recover damages for the destruction by fire of a grist mill and outbuildings and of grain stored therein. Trial by jury was had. Verdict and judgment were for the plaintiff. The fire in question, which occurred May 12, 1905, was alleged to have been communicated by a locomotive engine on the Connecticut & Passumpsic Rivers Railroad, which, on the date named, was operated by the defendant as lessee.[2] . . . The fire was first seen on the roof of an old blacksmith shop owned by the plaintiff standing on the easterly side of the railroad track and, to about one-third of its extent, on the right of way of the railroad. . . . After this fire was so far overcome that, as some of the evidence tended to show, it was thought to have been put out, it started up again, and the wind, which had been blowing towards the east, changed its course and blew strongly towards the west, carrying fire to a shed on the west side of the track, and thence to a stockhouse and factory of the Cushman & Rankin Company, and thence to the grist mill and outbuildings of the plaintiff above referred to. The plaintiff's evidence tended to show that the fire on the roof of the blacksmith shop was communicated to it from one of the defendant's locomotives, and, all questions of negligence on the part of both parties and of intervening causes being for the time left out of consideration, the entire conflagration stands as an integral effect of the cause which

[1] The remainder of the opinion is omitted. See also Elder *v.* Lykens Valley Coal Co., 157 Pa. 490, 27 Atl. 545; Howe *v.* West Seattle L. & I. Co., 21 Wash. 594, 59 Pac. 495. — ED.

[2] Part of the opinion is omitted. — ED.

started the fire on the roof of the blacksmith shop. Isham *v.* Dow's Estate, 70 Vt. 588, 41 Atl. 585, 45 L. R. A. 87, 67 Am. St. Rep. 691. The defendant quotes from Ryan *v.* New York Central R. R. Co., 35 N. Y. 210, 91 Am. Dec. 49, and also cites Pennsylvania R. R. Co. *v.* Kerr, 62 Pa. 353, 1 Am. Rep. 431. These cases, however, are pretty generally discredited. See with regard to them Milwaukee, etc., Ry. Co. *v.* Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256, and what is said of them in Isham *v.* Dow's Estate, 70 Vt. 588, 41 Atl. 585, 45 L. R. A. 87, 67 Am. St. Rep. 691. As appears from the Isham Case, these cases are not followed here. We do not understand, considering the argument of the defendant as a whole, that the doctrine of these cases is relied on. The defendant's real claim in this regard, as appears from the brief in its behalf, is that there were intervening causes in view of which the fire which started the blaze on the blacksmith shop cannot be regarded as the proximate cause of the loss for which recovery is sought. The claim is that there were two intervening causes: One, the conduct of the plaintiff in its doings, and omissions in respect to the blacksmith shop after the fire had been practically subdued; and the other the change of the wind and the increase in its velocity. The sudden change in the force and direction of the wind cannot be regarded as an intervening agency. On the question of whether or not one's conduct in setting a fire is or is not negligent, the condition of the ground and premises, as to dryness or wetness, the time of starting the fire, whether in the evening or morning, the condition of the air, whether still or windy, and, if there is a wind, the direction in which it is blowing, may sometimes be proper matters for consideration. But when negligence in setting out a fire is established, as in the discussion of this point we are to assume it to have been here, changes in the direction and force of the wind and in other conditions may carry the result of the negligence further than it would otherwise have gone, and yet liability attach for the consequent injuries, although entirely unforeseen. The distinction is clearly made in Isham *v.* Dow's Estate, 70 Vt. 588, 591, 41 Atl. 585, 586, 45 L. R. A. 87, 67 Am. St. Rep. 691. It is there said: "On the question of what is negligence, it is material to consider what a prudent man might reasonably anticipate; but, when negligence is once established, that consideration is entirely immaterial on the question of how far that negligence imposes liability." Gilson *v.* Canal Co., 65 Vt. 213, 26 Atl. 70, 36 Am. St. Rep. 802, is to the same effect. So is Stevens *v.* Dudley, 56 Vt. 158. Among the cases cited in Gilson *v.* Canal Co., 65 Vt. 213, 26 Atl. 70, 36 Am. St. Rep. 802, is the case of Smith *v.* London & Southwestern Ry. Co., L. R. 6 C. P. 14. That was a case of fire communicated from a locomotive engine. The fire broke out between the rails and a hedge, from thence spread to a stubble-field beyond, and from the stubble-field was carried by a high wind over a road to the plaintiff's cottage, which was burned. The cottage was two hundred yards from the place where the fire started.

Notwithstanding a concurrence of circumstances which, as the court recognized, no one could have been expected to foresee, the court held that, since the fire was negligently set, the railway company was liable since, after all, the injury proceeded from the original fire through the operation of natural causes. Doubtless such an extraordinary phenomenon in nature as in legal acceptation is an act of God would be an intervening cause. Stevens *v.* Dudley, 56 Vt. 158, 167. But in this latitude we know no winds which can be counted on to blow for any length of time with a force and direction practically unvaried except for some extraordinary violence of nature. Such winds as we ordinarily know, such winds as the evidence here relates to, are not intervening agents. Milwaukee, etc., Ry. Co. *v.* Kellogg, 94 U. S. 469, 24 L. Ed. 256; Chicago, etc., R. Co. *v.* Lesh, 158 Ind. 423, 63 N. E. 794; Union Pacific Ry. Co. *v.* McCollum, 2 Kan. App. 319, 43 Pac. 97; Chicago, etc., R. Co. *v.* Williams, 131 Ind. 30, 30 N. E. 696; Perley *v.* Eastern R. Co., 98 Mass. 414, 96 Am. Dec. 645; Florida, etc., Ry Co. *v.* Welch, 53 Fla. 145, 44 So. 250.[1]

TEXAS & NEW ORLEANS RAILROAD CO. *v.* BELLAR.

COURT OF CIVIL APPEALS, TEXAS, 1908.

[*Reported* 51 *Tex. Civ. App.* 154.]

McMEANS, J. This was a suit brought by the appellees, L. A. Bellar and wife, against the appellant, Texas & New Orleans Railroad Company, for damages resulting to them from the loss by fire of two houses in Beaumont.

Appellees alleged that appellant negligently permitted oil to escape from an oil tank on its premises and from tank cars on its switches, and that the oil so escaping saturated the ground upon which their houses were situated, as well as all that intervening between the tank, switches, and plaintiffs' premises, rendering the same highly inflammable, extrahazardous as regarded the danger of being set on fire, and that such condition greatly increased the danger of fire, and was the proximate cause of the fire which destroyed their houses. They also alleged the destruction of the houses by fire, which fire, they alleged, started in the nighttime, and was "carelessly and negligently set by defendant, its agents and servants, in operating its engines and cars adjacent to plaintiffs' premises, by fire escaping therefrom, or by said employees in some other manner, or by its employees, otherwise engaged in its behalf thereabout, or by some other person or agency,

[1] See also Higgins *v.* Dewey, 107 Mass. 494; Needham *v.* King, 95 Mich. 303, 54 N. W. 891. — ED.

plaintiffs being unable to point out with any greater certainty the origin or cause of the fire, but allege that same would not have been set out and plaintiffs' property destroyed but for the highly inflammable and extrahazardous condition in which plaintiffs' premises were placed by the escape of oil as aforesaid." [1] . . .

By its first proposition under the assignments appellant contends that the escape of the oil was not shown to have been the proximate cause of the fire and the consequent destruction of plaintiffs' property, but that the proximate cause of the loss was the communication of the fire to the oil, and inasmuch as the origin of the fire was not shown the defendant cannot be held liable.

The finding of the jury that the negligence of the defendant in permitting the oil to escape, thereby causing the ground to become so saturated with oil as to create the danger of setting fire to plaintiffs' property, was the proximate cause of the destruction of the property, is sustained by the evidence. The fact that the fire might have started from some cause other than through an act of the railroad company does not exculpate the defendant. It may be that the defendant was in no wise responsible for the origin of the fire, and the evidence does not show that it was; but it was responsible for the part its negligence performed. That negligence consisted in bringing about a condition which subjected the plaintiffs' property to a danger, which resulted in its destruction, which did not theretofore exist, and which danger and result was reasonably apparent to and should have been foreseen by a person of ordinary prudence. It is true that the oil of itself did not create the danger, and that the danger therefore did not arise until some other act was performed, namely, the kindling of the fire which ignited the oil. Neither would the kindling of the fire at a point near or remote from the property have created the danger but for the presence of the oil. It is not always the last act of cause or nearest act to the injury that is the proximate cause, but such act, wanting in ordinary care, as actively aided in producing the injury as a direct and existing cause. It need not be the sole cause, but it must be a concurring cause, such as might reasonably have been contemplated as involving the result under the attending circumstances. Gonzales *v.* Galveston, 84 Tex. 7; Gulf, C. & S. F. Ry. *v.* Rowland, 90 Tex. 370; New York T. & M. Ry. *v.* Green, 36 S. W. 813; Galveston *v.* Posnainsky, 62 Tex. 134; Mexican Nat. Ry. *v.* Mussette, 86 Tex. 719; Seale *v.* Gulf, C. & S. F. Ry, 65 Tex. 277.

[1] Part of the opinion is omitted. — ED.

SECTION III.

Interposition of the Act of an Animal.

SNEESBY *v.* LANCASHIRE & YORKSHIRE RAILWAY CO.

COURT OF QUEEN'S BENCH, 1874.

[*Reported*, L. R. 9 Q. B. 263.]

BLACKBURN, J. I am of opinion that the rule must be made absolute. The facts seem to be that, by what is admitted to have been negligence on the part of the servants of the company, the cattle of the plaintiff, as they were crossing the railway on the level, were frightened and scattered, so that for a time the plaintiff's drovers lost control of all of them; they recovered the chief part of the cattle, but some were found killed on another railway. It happens that this was also the defendants' railway; and it appears that the cattle got on to the railway through a defect in the fence of a garden or orchard belonging to the defendants; but from the nature of the accident it seems to me that we may treat the case as if it had been the railway of some other company, or as if the cattle had fallen down an unguarded quarry. The question is, are the defendants, whose negligence drove the cattle out of the custody of the plaintiff, liable for their death, or is the damage too remote? No doubt the rule of our law is that the immediate cause, the *causa proxima*, and not the remote cause, is to be looked at: for, as Lord Bacon says: "It were infinite for the law to judge the causes of causes and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." The rule is sometimes difficult to apply, but in a case like the present this much is clear, that so long as the want of control over the cattle remains without any fault of the owner, the *causa proxima* is that which caused the escape, for the consequences of which he who caused it is responsible. Suppose, for instance, in former times a reclaimed falcon were frightened and escaped, the natural consequence would be that it would be lost altogether, and the person who negligently frightened it would be liable. The natural and proximate consequence was that it would not be got back at all. So, if you have lost control of cattle and cannot get them back under your control till they have run into danger and are killed, the death is a natural consequence of the negligence which caused you to lose control of them. It is the most natural consequence of cattle being frightened that they should go galloping about and get into a dangerous position, and, being in the neighborhood of railways,

should get on the line and be run over by a passing train, whether that of the defendants or not is immaterial. When once it is established that the cattle were driven out of the control of the plaintiff by the defendants' negligence and that the control could not be recovered till they were killed, which was the natural consequence of their being uncontrolled, the liability of the defendants is beyond dispute. Lawrence v. Jenkins seems directly in point; the other cases when looked into do not go quite so far; but on principle there can be no doubt that the defendants are liable.

QUAIN, J. It is well established that a person is liable for all the consequences of his wrongful act: of which the well-known case of Scott v. Shepherd, 2 W. Bl. 892, is an instance; where a squib, having been thrown in a crowd, and having been hastily thrown away by two other persons, and ultimately injured the plaintiff, the wrong-doer, the original thrower, was held liable. So, where the plaintiff's cattle got through a defective hedge which the defendant was bound to keep in repair, and were killed, in one case by falling into a pit, and in another by the falling of a haystack upon them, the defendant was held liable. Here the defendants' porters, who were responsible for the proper management of the sidings and level crossing, are the persons doing the illegal act, the consequence of which was the escape and death of the cattle. In a case of contract the question is very different. In tort the defendant is liable for all the consequences of his illegal act where they are not so remote as to have no direct connection with the act, as by the lapse of time, for instance. Applying that to the present case, I think the damage to the cattle was not so remote from the injurious act as not to be the natural consequence of the act. The injurious act was the negligence of the defendants' servants in allowing trucks to be suddenly shunted across a level crossing at eleven o'clock at night without any warning, so that the plaintiff's cattle were frightened. The place was very dangerous from the numerous branch railways, and they, having escaped from the plaintiff's control, got on to one of the railways and were killed on the same night. These circumstances, I think, bring the case within the rule; and the death of the cattle was not so remote from the negligence of the defendants as to render the damages not recoverable.

ARCHIBALD, J. When the facts are understood, there can be no doubt as to the application of the rule that a wrong-doer is liable for all the consequences of his wrongful act. The defendants' servants had been guilty of a wrongful act, and the important fact (which, it appears, at the trial was conceded) is that, although all was done that could be done, it was impossible for the drovers to regain control of some of the cattle before they were killed. The natural consequence

of the cattle being frightened was that they should stray, and, so straying in the neighborhood of a railway, should get on to it, and so, lying down or remaining on it, should be run over by a passing train. Therefore all is referable, as the proximate cause, to the original negligence of the defendants' servants.

Rule absolute.

1627 2nd

GILMAN *v.* NOYES.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE, 1876.

[*Reported* 57 *N. H.* 627.]

CASE, for carelessly leaving the plaintiff's bars down, whereby his cattle and sheep escaped, and he was compelled to expend, and did expend, time and money in hunting for the same, and his sheep were wholly lost.

The evidence tended to show that the defendant, in looking after his own cattle, left the plaintiff's bars down, and that his cattle, and three sheep belonging to one Marshall, and which the plaintiff was pasturing, were wholly lost. The defendant denied that said cattle and sheep escaped through the bars, and introduced evidence tending to show that they escaped through other fence of the plaintiff, and without fault on the part of the defendant. As tending to show that the defendant was liable, the plaintiff, without objection, testified that he called on the defendant, soon after he ascertained that his cattle and sheep had escaped, and claimed that they had escaped through his fault and requested him to go and look them up; to which the defendant replied, that he could not then go, but that the plaintiff must look them up himself, and he would pay him what was right for the damage and for his trouble. The defendant did not admit that he made these statements, as testified to by the plaintiff, and claimed that whatever he did say was under a misapprehension. The evidence tended to show that the sheep were destroyed by bears after they had escaped from the plaintiff's pasture. The defendant claimed that the damages were too remote, and that they were not the natural consequences of the alleged careless acts of the defendant. The defendant requested the following instructions:

1. If the jury find to be true the statement of the plaintiff, that, when he went and first called on the defendant, the defendant told him that he was in for the damage, and he wanted him, the plaintiff, to hunt up the cattle, and he would pay the plaintiff what was right for the damage, and that the plaintiff assented to this, he cannot recover in this form of action.

2. That if the jury find that the plaintiff and the defendant agreed that the plaintiff should hunt up the cattle, and that the defendant should pay him what was right for the damages, this action cannot be maintained.

3. If the jury find that it was agreed by the parties that the plaintiff was to hunt up the cattle, and the defendant was to pay the plaintiff the expense and trouble of hunting, the plaintiff cannot recover for such trouble and expense so incurred at the request of the defendant in this form of action. His remedy would be assumpsit.

4. That, the sheep being the property of Marshall, the plaintiff cannot in this action recover the value of the same.

5. That if the jury find that the sheep were killed by bears after their escape from the pasture, the plaintiff cannot recover, as the damages would be too remote.

These requests the court denied, but did instruct the jury, among other things, that if the defendant left the plaintiff's bars down, and his cattle thereby escaped, he was entitled to recover for the time and money expended in hunting for them; that if the sheep were in his possession and care, and they escaped in consequence of the bars being left down by the defendant, and would not have been killed but for the act of the defendant, he was liable for their value, whether the plaintiff was the absolute owner or not; that the statements made by the defendant were proper to be considered by the jury upon the question whether or not the damages to the plaintiff were occasioned by the acts of the defendant. To all of which refusals and instructions the defendant excepted.

The jury returned a verdict for the plaintiff, and assessed the damages for hunting for the cattle at $13.16, and for the sheep at $9.

The defendant moved to set the verdict aside, and for a new trial.

The questions of law arising on the foregoing case were transferred by Stanley, J., C. C.

CUSHING, C. J. The objection to the requests for instructions in regard to the compromise is, that they are not based upon the evidence. The evidence was to the effect that the defendant admitted his liability, and said that he would pay the damage. But there was nothing said or done by the parties from which the jury could infer an accord and satisfaction if it had been pleaded, and that defense could not be taken at all without a plea to that effect.

As to the objection that the plaintiff could not recover because the sheep were the property of Marshall, it seems enough to say that it is very well settled in this state that a bailee has sufficient interest in the property bailed to sustain an action for damage done to it.

It should have been left to the jury to determine whether the injury

was one for which the defendant's fault was the proximate cause. The court rightly refused to instruct the jury that the damage was too remote, because that was a matter for the jury to determine. I am not prepared, however, to hold, that the criterion, for determining whether the defendant's fault was the proximate cause of the damage, is, whether the damage would or would not have happened without the defendant's fault.

This matter of remote and proximate cause has been recently a good deal discussed in the case of fires occasioned by the negligent management of locomotives. Where the fire has spread from point to point and from building to building, the question to what extent the negligence was the proximate cause has been held to be for the jury to determine. But in no one of those cases, whether the damage was held to be proximate or remote, could it have happened at all except for the negligence complained of.

I think the doctrine of the cases now is, that the question whether the damage is remote or proximate is a question of fact for the jury, and that the jury have to determine whether the damage is the natural consequence of the negligence, and such as might have been anticipated by the exercise of reasonable prudence. If the damage would not have happened without the intervention of some new cause, the operation of which could not have been reasonably anticipated, it would then be too remote. 2 Parsons on Contracts, 179; State *v.* Manchester & Lawrence Railroad, 52 N. H. 552, and cases there cited; Fent *v.* Toledo, Peoria & Warsaw Railway Co., 59 Ill. 349; S. C. 14 Am. R. 13.

In the present case it appears that the evidence tended to show the intervention of such new cause — viz., bears — and it would have been for the jury to say whether it was natural and reasonable to expect that if the sheep were suffered to escape they would be destroyed in that way.

If these views are correct, the verdict must be set aside, and a new trial granted.

SMITH, J. I concur in the foregoing conclusions of the chief justice, and for the reasons given by him. The principal question in this case has been much discussed in the English and American courts, though but little in this State. The rule, that the plaintiff can recover only when the defendant's act or negligence was the proximate cause of the injury, is one of universal application; but the difficulty lies in determining when the cause is proximate and when remote. It is a mixed question of law and of fact, to be submitted to the jury under proper instructions. We have recently held that it is always for the jury to say whether the damage sustained is what the defendant ought to have expected, in the exercise of reasonable care and discretion. Stark *v.* Lancaster, 57 N. H. 88, and authorities cited; McIntyre *v.* Plaisted, 57 N. H. 606. See, also, State *v.* M. & L. R. R., 52 N. H.

552; Cate v. Cate, 50 N. H. 144; Underhill v. Manchester, 45 N. H. 218.

The rule, as thus laid down, is also given in substance in 2 Parsons on Contracts, 456; 2 Gr. Ev., § 256, and Sedgwick on Damages, 88. The numerous cases in which this question has been discussed are cited by the above authors. It would be an unnecessary labor to review them in detail.

In this case the evidence tended to show the intervention of a new cause of the destruction of the plaintiff's sheep after their escape from his pasture, which could not reasonably have been anticipated. The only practicable rule to be drawn from all the cases, for determining this case, it seems to me, is, to inquire whether the loss of the plaintiff's sheep by bears was an event which might reasonably have been anticipated from the defendant's act in leaving his bars down, under all the circumstances of this case. If it was a natural consequence which any reasonable person could have anticipated, then the defendant's act was the proximate cause. If, on the other hand, the bears were a new agency, which could not reasonably have been anticipated, the loss of the sheep must be set down as a remote consequence, for which the defendant is not responsible.

The jury were instructed that if the sheep escaped in consequence of the bars being left down by the defendant, and would not have been killed but for this act of the defendant, he was liable. Under these instructions the jury could not inquire whether the destruction of the sheep by the bears was an event which might reasonably have been anticipated from the leaving of the bars down, and for this reason I agree that the verdict must be set aside.

LADD, J. I am unable to free my mind from considerable doubt as to the correctness of the ground upon which my brethren put the decision of this case.

The defendant requested the court to charge that, if the jury found that the sheep were killed by bears after their escape, the damages would be too remote. This the court declined to do, but did instruct them that if the sheep escaped in consequence of the bars being left down by the defendant, and would not have been killed but for that act of the defendant, he was liable for their value. Both the request and the instruction went upon the ground that the question of remoteness — all the facts being found — was for the court, and not for the jury. Upon that distinct and simple question the defendant claimed one way and the court held the other. I understand it to be the opinion of my brethren that neither was right; that the question of remoteness was for the jury, and that the court erred in not so treating it. Whether it is for the jury or the court, everyone who has considered the matter will agree that it is almost always a troublesome question, and often one attended with profound intrinsic difficulty.

The verdict here settles (1) that the bars were left down by the defendant; (2) that the sheep escaped in consequence thereof; (3) that they would not otherwise have been killed. Was the defendant's act the proximate cause of the damage? Was it the cause in such sense that the law will take cognizance of it by holding the defendant liable to make reparation in damages? And is that question one for the court, or for the jury, to decide? The sheep would not have been killed, the jury say, but for that act: does it follow that the damage was not too remote? Certainly, I think, it does not. That one event would not have happened but for the happening of some other, anterior in point of time, doubtless goes somewhat in the direction of establishing the relation of cause and effect between the two. But no rule of law as to remoteness can, as it seems to me, be based upon that one circumstance of relation alone, because the same thing may very likely be true with respect to many other antecedent events at the same time. The human powers are not sufficient to trace any event to all its causes, or to say that anything which happens would have happened just as it did but for the happening of myriads of other things more or less remote and apparently independent. The maxim of the schoolmen — *Causa causantis, causa est causati* — may be true, but it obviously leads into a labyrinth of refined and bewildering speculation whither the law cannot attempt to follow. This case furnishes an illustration. The jury say the sheep would not have been killed by bears but for their escape, and would not have escaped but for the bars being left down. But it is equally certain, without any finding of the jury, that they would not have been killed by bears if the bears had not been there to do the deed; and how many antecedent facts the presence of the bears may involve, each one of which bore a causative relation to the principal fact sufficiently intimate so that it may be said the latter would not have occurred but for the occurrence of the former, no man can say. Suppose the bears had been chased by a hunter, at any indefinite time before, whereby a direction was given to their wanderings which brought them into the neighborhood at this particular time; suppose they were repulsed the night before in an attack upon the beehives of some farmer in a distant settlement, and, to escape the stings of their vindictive pursuers, fled, with nothing but chance to direct their course, towards the spot where they met the sheep; suppose they were frightened that morning from their repast in a neighboring cornfield, and so brought to the place of the fatal encounter just at that particular point of time.

Obviously the number of events in the history not only of those individual bears, but of their progenitors clear back to the pair that, in instinctive obedience to the divine command, went in unto Noah in the ark, of which it may be said, but for this the sheep would not have been killed, is simply without limit. So the conduct of the sheep, both before and after their escape, opens a field for speculation equally pro-

found and equally fruitless. It is easy to imagine a vast variety of circumstances, without which they would not have made their escape just at the time they did though the bars were down, or, having escaped, would not have taken the direction to bring them into the way of the bears just in season to be destroyed, as they were. Such a sea of speculation has neither shores nor bottom, and no such test can be adopted in drawing the uncertain line between consequences that are actionable and those which are not.

Some aid in dealing with this question of remoteness in particular cases is furnished by Lord Bacon's rule — *In jure causa proxima, non remota spectatur* — and other formulas of a like description, because they suggest some boundaries, though indistinct, to a wilderness that otherwise, and perhaps in the nature of things, has no limit.

Where damages are claimed for the breach of a contract, it has been said that the nearest application of anything like a fixed rule is, that the injury for which compensation is asked should be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of contract. Cockburn, C. J., in Hobbs *v.* London & S. W. Railway Co., L. R. 10 Q. B. 117. In tort, they must be the legal and natural consequence of the wrongful act. Sedgwick on Damages, 82, and cases cited; 2 Gr. Ev., §§ 252–256, and cases cited. But an examination of the numerous cases where this matter has been carefully and learnedly discussed, shows that the intrinsic difficulties of the subject are not removed, although they may be aided, by the application of such rules. Whether the extent, degree, and intimacy of causation are sufficient to bring the injurious consequences of an act within the circle of those wrongs for which the law supplies a remedy still remains the great question to be determined in each case upon its individual facts. That the subject is one beset with difficulties is conspicuously shown by the great number of cases, from Scott *v.* Shepherd, 2 Wm. Bl. 892 (where Sir William Blackstone was unable to agree with the court), down to the present time, in which judges of equal learning and ability have differed as to the application of rules by which all admit they are to be governed.

The recent case of Brand *v.* Hammersmith & City Railway Co., L. R. 1 Q. B. 130, well illustrates this remark, although the construction of a statute was there involved. It was held by the court of queen's bench (Mellor and Lush, JJ., delivering opinions), that the owner of a house, none of whose lands have been taken for the purposes of a railway, cannot, under certain statutes, recover compensation in respect of injury to the house — depreciating its value — caused by vibration, smoke, and noise in running locomotives with trains in the ordinary manner after the construction of the railway. Upon error to the exchequer chamber this decision of the queen's bench was reversed by Bramwell, B., Keating, and Montague Smith, JJ., Channel, B., dissenting. Sir William Earle, while chief justice of the

common pleas, had also prepared an opinion sustaining the judgment of the queen's bench, which was not delivered because the formal judgment of the court was delayed till after his resignation. L. R. 2 Q. B. 223, note p. 246.

The cause was then carried, upon error, to the House of Lords, and the judges were called in. Of the judges who returned answers, five were in favor of affirming the judgment of the exchequer chamber, viz., Willes, Keating, and Lush, JJ., and Bramwell and Piggott, BB.; while Mr. Justice Blackburn delivered a strong opinion the other way. In the House of Lords, Lord Chelmsford and Lord Colonsay were for reversing the judgment of the exchequer chamber, while the Lord Chancellor was for affirming it. So that, of all the judges and law lords who examined the question (including Sir William Earle), six were of the opinion that the damages could not be recovered, and seven of a contrary opinion; while Lush, J., changed his mind between the hearing in the queen's bench and that before the House of Lords, and delivered an opinion the other way. The case was finally decided against the opinions of a majority of the judges who considered it.

The question is, whether courts can relieve themselves from troublesome inquiries of this description by handing them over to the jury for determination. I am not now prepared to admit that they can. In this case, as we have seen, the verdict settles that the defendant left the bars down, that the sheep escaped in consequence, and that they would not have been killed but for their escape. Clearly, no disputed fact is left unsettled. The only question left open is, whether the damage is within or without the line drawn by the law as the boundary between those injuries for which the law compels compensation to be made and those for which it does not. It is the law that furnishes remedies. Whether any act or default amounts to a legal wrong and injury for which compensation may be recovered depends upon the law, and is to be determined by an application of rules either furnished by the legislature in the form of statutes, or found existing in the common law. If the law takes no cognizance of an act, furnishes no remedy for its injurious results, then there is no remedy; and though it may be wrong in a sentimental or moral point of view, the sufferer can have no recompense. And I cannot see what difference it makes in this respect whether the rule is established by a statute, or comes from the common law. That A can recover damages against B for an assault and battery committed upon him by the latter, depends just as much upon a rule of positive law, in this State, as that he may recover against C, who has unlawfully furnished liquor to B, who, in a state of intoxication produced by the liquor, makes the assault. One is a provision of the common law; the other, of a statute. When the court of South Carolina held that where a person, against the law, furnished a slave with intoxicating liquor, by which he became drunk and lay out all night, and died in consequence, the owner of the slave could recover

his value against the person who furnished the liquor (Berkley *v.* Harrison, cited in Sedgwick on Damages, 89), they were declaring and applying a rule of law as much as though that remedy had been given by a statute similar to ours. So it is in the great mass of cases with which the books are filled: the question as to remoteness is determined by the court, and the rule administered as a rule of law. See cases cited in Sedgwick on Damages, ch. III, *passim*. A large number of English and American cases might be added, were any citation of authorities necessary.

In Hobbs *v.* The London & S. W. Railway Co., already referred to, the plaintiff, with his wife and two children, took tickets on the defendants' railway from Wimbledon to Hampton Court, by the midnight train. They got into the train, but it did not go to Hampton Court, but went along the other branch to Esher, where the party were compelled to get out. It being so late at night, the plaintiff was unable to get a conveyance or accommodation at an inn; and the party walked to the plaintiff's house, a distance of about five miles, where they arrived about three in the morning. It was a drizzling night, and the wife caught cold and was laid up for some time, being unable to assist her husband in his business as before, and expenses were incurred for medical attendance. The jury gave £28 damages — viz., £8 for the inconvenience suffered by having to walk home, and £20 for the wife's illness and its consequences. The court held the £20 too remote. Blackburn, J., after stating the rule substantially as given by the chief justice, says: "For my own part, I do not feel that I can go further than that. It is a vague rule, and, as Bramwell, B., said, it is something like having to draw a line between night and day: there is a great duration of twilight when it is neither night nor day." And further on: "I do not think it is anyone's fault that it cannot be put more definitely. I think it must be left as vague as ever as to where the line must be drawn — but I think, in each case, the court must say whether it is on the one side or the other; and I do not think that the question of remoteness ought ever to be left to a jury. That would be, in effect, to say that there shall be no such rule as to damages being too remote; and it would be highly dangerous if it was to be left generally to the jury to say whether the damage was too remote or not."

Of course, all matters of fact, with respect to the causative relation that exists between the act complained of and the injurious consequences for which damages are sought, must be found by the jury; and so, in one sense, it may be said that the question of remoteness is for the jury, under proper instructions by the court; but my doubt is, whether proper instructions by the court should not contain specific direction as to whether any given fact of injury, if found proved, would or would not, with respect to the alleged cause, occupy the position of remoteness beyond the actionable degree.

In the present case, if all the facts found by the jury had been well

pleaded in the declaration, and there were a demurrer, would it not be the duty of the court to say whether the action could be maintained?

There are a few American cases which seem to give countenance to the view upon which this case has been decided by the court. Fairbanks *v.* Kerr, 70 Pa. St. 86; Saxton *v.* Bacon, 31 Vt. 540; Fent *v.* Toledo, Peoria & Warsaw Railway Co., 59 Ill. 349, are, perhaps, to be so regarded.

Should it be said that the question, whether a given consequence is one which might fairly be anticipated by one knowing the facts, is in its nature a question of fact, it must at the same time be admitted that it is a fact which lies rather in the region of conjecture than of evidence and must be determined by an appeal to the experience and knowledge of human nature, and the natural sequence of cause and effect possessed by him who is to decide it, rather than by weighing testimony and balancing proofs, while it is at the same time pure matter of law whether a given act is prohibited, and pure matter of law and construction whether a remedy is given by the law, written or unwritten, for an injury sustained in consequence of such act. But, however the American cases referred to are to be understood, it seems to me the great weight of authority is against the conclusion of the court; for every case, where the simple question of remoteness has been determined by the court, and the rule applied as a rule of law, would seem to be a direct authority the other way. Those cases are too numerous and too familiar to need citation.

The charge of the court was in accordance with this view. The jury were required to find whether the act of the defendant in leaving the bars down was an event without which the loss would not have occurred; and then the court undertook to apply a rule of law by saying that, if that particular relation of cause and effect did exist, the consequence was so near, so direct, and followed so naturally from the cause, that it must be regarded as a legal consequence for which the defendant should be held to make reparation in damages. I am not prepared to say that this was error.

As the case is disposed of upon different grounds, it is unnecessary to consider whether the holding of the court upon this question of remoteness was right or not. A few cases may, however, be referred to, which bear more or less directly upon that question, as well as the main question I have been considering. In Powell *v.* Salisbury, 2 Y. & J. 391, the plaintiff declared in case against the defendant, for not repairing his fences, *per quod* the plaintiff's horses escaped into the defendant's close, and were there killed by the falling of a haystock: held, that the damage was not too remote, and that the action was maintainable. In Lee *v.* Riley, 18 C. B. (N. S.) 722, the defendant's mare strayed into a field belonging to the plaintiff, through the defect of a fence which the defendant was bound to repair, and kicked the plaintiff's horse: held, that the defendant was responsible for his

mare's trespass, and that the damage was not too remote. In Lawrence v. Jenkins, L. R. 8 Q. B. 274, the plaintiff's cows strayed upon the defendant's close through a gap in the division fence, made by the carelessness of the defendant's servants in felling a tree upon it, and there fed on the leaves of a yew tree, and died in consequence: held, that the damage was not too remote, and that the defendant was liable to the plaintiff for the loss of the cows. In Cate v. Cate, 50 N. H. 144, a question very similar to this was left undecided. But Bellows, C. J., says: "Upon a careful consideration of the cases, we think there is some preponderance of authority in favor of the position that, in a case like this, a party is in some form of action responsible for the consequences of his wrongful act, when they are distinctly traceable to that act, although such consequences may be both remote and accidental." In Davis v. Garrett, 6 Bing. 716, the defendant contracted to carry in his barge the plaintiff's lime, and the master of the barge deviated unnecessarily from the usual course, and during the deviation a tempest wetted the lime, and, the barge taking fire, the whole was lost.

The defendant was held liable for the lime, the cause of the loss being sufficiently proximate. The court say in their opinion, delivered by Tindal, C. J.: "We think the real answer to the objection [that of remoteness] is, that no wrongdoer can be allowed to apportion or qualify his own wrong." But in Greenland v. Chaplin, 5 Exch. (W. H. & G.) 243, Pollock, C. B., says: "I am desirous that it may be understood that I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated."

Upon the other questions in the case I agree with my brethren, for the reasons given by them.

According to the views of a majority of the court, there was

A new trial granted.

WEST v. WARD.

SUPREME COURT OF IOWA, 1889.

[*Reported* 77 *Ia.* 322.]

BECK, J. I. The petition alleges substantially that plaintiff was the lessee of certain pasture land wherein he kept certain valuable horses, among others a highly bred and well-trained young trotting mare of great value; that defendant unlawfully went upon the premises, wrongfully and negligently opened the fence enclosing it, and left it open, which permitted the young mare to escape from the pasture;

that the country surrounding the pasture was largely fenced with barbed wire, which is dangerous to stock running at large; and that the mare, in attempting to return to the locality from which she had been brought, became entangled in a barbed-wire fence, and was severely cut and wounded, so that her value was almost destroyed. The evidence tends to support the allegations of the petition, showing that the country about the pasture was largely fenced with barbed wire, which is dangerous to stock, especially those running at large. The defendant moved the court for a verdict in his behalf on the following grounds: "First. The evidence introduced by the plaintiff fails to show that the wrong of the defendant of which the plaintiff claims is the proximate cause of the injury for which he sues. Second. The evidence of the plaintiff shows affirmatively that the wrong of the defendant of which the plaintiff pleads is not the proximate cause of the injury for which plaintiff sues, but that it is the result of an independent cause. Third. No evidence has been introduced tending to show that the injury of which the plaintiff claims is the usual and ordinary, natural and probable and approximate result of the alleged wrongful conduct of the defendant." This motion was sustained, and a verdict accordingly returned, upon which a judgment was rendered for defendant.

II. We need not determine whether the question of the sufficiency of the evidence to show that the act of defendant in opening the fence was the proximate cause of the injury, and the usual, ordinary, natural, and probable result of the defendant's act was exclusively for the court or for the jury. Upon this question, see Dubuque Wood, etc., Ass'n *v.* City and County of Dubuque, 30 Iowa, 176; Knapp *v.* Railway Co., 71 Iowa, 41; Handelun *v.* Railway Co., 72 Iowa, 709; Bosch *v.* Railway Co., 44 Iowa, 402; Scheffer *v.* Railway Co., 105 U. S. 249. If the record before us shows that defendant's act was the proximate cause of the injury, and should have been so found, the direction of the court requiring a verdict for defendant is erroneous. We are therefore to inquire whether the evidence shows that the injury to the mare was the usual, ordinary, natural, and probable result of defendant's act in opening the fence of the pasture.

III. The plaintiff's mare was kept in the enclosure of the pasture, not only that she might graze, but also that she might be protected from the dangers to such property resulting from her running at large. These dangers are many and obvious. Among them is the danger from barbed-wire fences, which, the evidence tends to show, especially exists as to horses of her kind running at large. If she had been kept in the enclosure of the pasture these dangers as to her would not have existed. When, through the defendant's act, she was permitted to run at large, the dangers commenced, and ended in the injury. The animal was exposed to the danger of barbed-wire fences as soon as she commenced running at large. It is plain that defendant's act exposed

the mare to the danger, and it is equally plain that the injury resulted from the act. It is also plain that this injury was the proximate result of defendant's acts, for it immediately followed that act as a sequence. It was the usual, ordinary, natural, and probable result, for the evidence tends to show that it was dangerous to permit horses of this kind to run at large. The word "dangerous" means "attended with danger, perilous, full of risk," etc. Where there is danger, peril, risk of a particular injury, which actually occurs, we must surely say that it is the usual, ordinary, natural, and probable result of the act exposing the person or thing injured to the danger and peril. In the case before us the mare was not exposed to danger of injury before she was permitted to run at large. Defendant's acts exposed her to danger of the injury. The injury followed without any intervening act adding to the danger or aiding to bring the animal within the exposure thereto. Surely defendant's act in breaking the fence, and thus permitting the mare to run at large, was the direct and proximate cause of the injury. We reach the conclusion that the district court erred in directing the jury to return a verdict for defendant.

The judgment is therefore reversed.[1]

KELSEY *v.* REBUZZINI.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1913.

[*Reported* 89 *Atl. Rep.* 170.]

THE defendant and one Woodruff were owners of adjoining tracts of land in Guilford. The boundary line between these tracts was the center line of a stream known as West River, which flows in a southerly direction. The defendant owned the east tract and Woodruff the west. The southern boundary line of the two tracts was a continuous line, and one Cobb owned a tract adjacent to both pieces on the south. Through this Cobb land the stream flowed. The boundary fence between the defendant and Woodruff was built of posts and three strands of wire. From the Cobb lot northerly for a little more than one-half the length of the other two lots it was situated on the westerly or Woodruff side of the stream. This portion was by agreement of the parties maintained by Woodruff. Beginning at the termination of this portion of the fence it crossed the stream and continued northerly on the easterly or Rebuzzini side of the stream. This section, pursuant to the agreement referred to, was maintained by the defendant. On July 16, 1912, the Woodruff lot, as the defendant well knew, was used for the pasturage of cattle, and 11 heifers belonging to the plaintiff were pastured there for hire. On the previous day a cow belonging to the

[1] See Texas & P. Ry. *v.* Bigham, 90 Tex. 223, 38 S. W. 162. — ED.

defendant had escaped from his land onto Woodruff's. In the effort to drive back the cow two of the defendant's children took down the two upper strands of wire in one of the lengths of fence belonging to the defendant to maintain. They were unable to replace the wire, and so reported to the defendant upon his arrival home that evening. He took no steps to repair the fence until after the occurrences hereinafter related. On the following day nine of the plaintiff's heifers passed through the fence at the point where the wires had been torn down into the defendant's lot. They then turned south along the stream, and finally into it and down it until they reached Cobb's lot, onto which they passed by reason of there being no sufficient fence across the stream at that point. A portion of Cobb's land lying back some four or five rods from the stream was cultivated by him, and had corn and potatoes growing upon it, the potatoes being nearest the stream. Some time prior to this day Cobb had caused a poisonous mixture to be sprayed upon the potato vines for their protection. This mixture had been prepared on the west bank of the stream by Cobb's agents, and in mixing it they had spilled some portion of it upon the grass upon the bank of the stream, and also to some extent upon the grass between the place where it was mixed and the potatoes, and in spraying the potatoes some of the mixture also was sprayed upon the grass along the edge of the potatoes. When the plaintiff's heifers reached Cobb's land they left the stream and passed along the west bank, cropping the grass where the poison had been spilled and sprayed, and thus ate some of the poison from the effects of which five of them died. They ate no potato tops. The defendant was familiar with the use of poisonous substances for spraying potato vines, but did not know that Cobb's potatoes had been sprayed; nor did he know that any poison had been spilled or sprayed upon the grass. The division fence between the defendant and Woodruff was not a legal fence as Woodruff knew, but he did not know the condition of it as left by the defendant's children.

PRENTICE, C. J. The plaintiff is not entitled to a judgment against the defendant unless two legal propositions are well founded, to wit: (1) That the defendant owed to him for the protection of his heifers grazing in Woodruff's pasture, from the consequences to them of escape therefrom, the duty of maintaining a sufficient division fence at the point where they made their escape onto the defendant's premises; and (2) that the breach of this duty, arising from the insufficiency of the fence at the point of escape, was the proximate or legal cause of the loss which befell him through the death of his heifers. The first of these propositions may be assumed without decision, and yet the plaintiff must fail in his action by reason of his failure to support the second.

(1) We have accepted as the most satisfactory definition of a proximate cause as related to a subsequent event, as one "which, in a natural sequence, unbroken by any new and intervening cause, produces that event, and without which that event would not have occurred. It

must be an efficient act of causation, separated from its effect by no other act of causation." Smith v. Conn. Ry. & Lighting Co., 80 Conn. 268, 270, 67 Atl. 888, 889 (17 L. R. A. (N. S.) 707); Swayne v. Conn. Co., 86 Conn. 439, 445, 85 Atl. 634, 737. The acceptance of this not unusual definition, however, does not by any means close the door of debate as to what it signifies in its practical application to varying conditions. There remains, for instance, the question of what it meant by "natural sequence," and what by "a new and intervening cause" breaking the sequence. Fortunately the exigencies of this case do not call upon us to enter into the discussion which has been invoked by attempts to arrive at a comprehensive answer to these questions. The facts, as found, present a situation which does not lie in fairly debatable ground. The immediate cause of the death of the plaintiff's heifers was their cropping poisoned grass upon the Cobb lot. The insufficient length of fence through which they passed to the defendant's premises did not harm them. It did not set in motion any agency of destruction which before it ceased to operate either directly, or through the interposition of some other agency set in motion by it, caused the death of the heifers. It brought about a new condition or situation rather. Smithwick v. Hall & Upson Co., 59 Conn. 261, 269, 21 Atl. 924, 12 L. R. A. 279, 21 Am. St. Rep. 104. This new situation was not one which exposed the cattle to new danger except as the intervention of some person's wrongful conduct might have created or might create such danger. Without such intervention they would, as far as appears, have been as safe upon the defendant's land as upon Woodruff's. Such intervention there was. Either Woodruff or Cobb or the defendant, we know not which, had failed to maintain a sufficient fence across the course of the stream where it entered upon Cobb's land. As a consequence the heifers passed upon that land. Here they would still have been exposed to no hazard, had not someone carelessly spilled poison upon the grass there. But it was there, and they were there, and they ate of it and died. We thus have a condition of things where the defendant's original wrong in neglecting to maintain the division fence between him and Woodruff led to harmful results, solely in consequence of the intervention of the acts or omissions of other parties, unrelated to defendant's wrong save in the sequence of events producing new situations, in the final one of which the careless conduct of a new wrongdoer came into deadly operation.

(2) The rule laid down by Cooley is that in such cases the injury will be imputed to the last wrongful act as the proximate cause, and not to that which was more remote. "If the original act was wrongful and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause passing by those which were innocent. But if the original wrong only becomes injurious in

consequence of the intervention of some distinctly wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." Cooley on Torts (3d Ed.) 101. This rule is doubtless too broadly stated, and needs qualification in this: That the negligent action of the first party in fault will be regarded as the proximate cause whenever the negligent act or acts of the subsequent wrongdoer or wrongdoers are such as the original wrongdoer, as a man of ordinary experience and sagacity, acquainted with all the circumstances, could reasonably have anticipated. "If such a person could have anticipated that the intervening act of negligence might, in a natural and ordinary sequence, follow the original act of negligence, the person first in fault is not released from liability by reason of the intervening negligence of another. If it could have not been thus anticipated, then the intervening negligent person alone is responsible." Shearman & Redfield on Negligence, § 34; Lane *v.* Atlantic Wks., 111 Mass. 136.

(3) In the present case the defendant doubtless was aware of the condition of the fence along the Cobb line, and might have anticipated the passage of cattle from his land through it. But he had no knowledge of poisoned grazing in the Cobb lot, and, however experienced or sagacious he might have been, could not have anticipated that some person might aimlessly have scattered poison about upon the grass there. That incident was one so entirely out of the range of human experience that he had no occasion to take it into his calculations, and the fault involved in it as an efficient cause of the death of the heifers was so distinct, independent, and complete, that the plaintiff's fault in not maintaining the division fence between him and Woodruff in a sufficient condition cannot be regarded as a cause of it. The defendant's failure in the maintenance of the fence did not stand to it in the relation of *causa causans*. "'Cause' and 'consequence' are correlative terms. One implies the other. When an event is followed in natural sequence by a result it is adapted to produce, or aid in producing, that result is a consequence of the event, and the event is the cause of the result." Monroe *v.* Hartford St. Ry. Co., 76 Conn. 201, 207, 56 Atl. 498, 501. The natural sequence of consequences flowing from the escape of the cattle from their pasture was effectually broken, and a new, distinct, and independent cause productive of their death introduced into the situation when the poisoned grazing was encountered.

There is error, the judgment is reversed, and the cause remanded, for the rendition of judgment for the defendant.

McDONALD v. SNELLING.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1867.

[*Reported* 14 *All.* 290.]

TORT. The declaration was as follows:

"And the plaintiff says that he was possessed and the owner of a certain sleigh, and a certain horse which was harnessed to said sleigh, and the plaintiff was sitting and riding in said sleigh so harnessed, in a certain highway called Eliot Street, in said Boston, into and across Tremont Street; and one Thomas Baker on the same day was possessed of a certain sleigh and also of a certain horse drawing the same through and along said Tremont Street towards and near said Eliot Street in said Boston. And whereas then on the same day the defendant was possessed of a certain sled or sleigh, and also of certain horses drawing the same through and along said Tremont Street, and the said defendant then and there, by a certain servant of him the said defendant, had the care, government, and direction of the said sled or sleigh of the said defendant and defendant's said horses, yet the said defendant, not minding or regarding his duty in this behalf, then and there by his said servant so negligently and unskillfully managed and behaved himself in this behalf, and so ignorantly, carelessly, and negligently drove and managed, guided and governed his said sled or sleigh and horses, that the said sleigh or sled of the said defendant, for want of good and sufficient care and management thereof, and of the horses then and there drawing the same as aforesaid, then and there struck against the said sleigh of the said Baker with such force and violence that the sleigh of the said Baker, wherein he was then sitting and riding as aforesaid, was broken to pieces, by means whereof the said horse of the said Baker was put to fright and ran with great violence, threw out said Baker, and escaping from him ran through and along said Tremont Street to said Eliot Street and into said Eliot Street, and upon, against, and over the plaintiff, his said sleigh and horse, with such force and violence that the plaintiff's said sleigh wherein he was then and there sitting and riding as aforesaid was thereby broken to pieces and destroyed, and the plaintiff thrown with great violence from and out of his said sleigh, and his collarbone broken, and otherwise greatly injured and bruised, and his life endangered, and the plaintiff's said horse was greatly damaged and spoiled. And the plaintiff used due care, and said Baker, his agents and servants, used due care, but said defendant, his agents and servants, did not use due care."

The defendant demurred to this declaration, assigning as causes of demurrer that there is no averment in the declaration that the injury to the plaintiff occurred by reason of or by means of the negligence of the defendant; and that it does not appear from the averments of

the declaration that the alleged negligence of the defendant was the proximate cause of the injury to the plaintiff, sufficient in law to render the defendant liable in damages.

This demurrer was overruled in the Superior Court, and judgment ordered for the plaintiff; and the defendant appealed to this court.

FOSTER, J. The question raised by this demurrer is, whether the injury received by the plaintiff was so remote from the negligent act of the defendant that the action cannot be sustained, although the plaintiff was injured without his own fault, and would not have been injured but for the fault of the defendant. How far at common law is one guilty of negligence responsible in damages for the consequences resulting from his neglect?

If the present action had been brought against a town, under circumstances similar to those disclosed in this declaration, Marble *v.* Worcester, 4 Gray, 395, would be a decisive authority in favor of the defendant. The liability for damages caused by defects in highways is limited to cases where the defect is the direct and immediate cause of the injury. Jenks *v.* Wilbraham, 11 Gray, 142. But this statute liability is more narrowly restricted than the rule in actions at common law for damages caused by negligence, in which it is perfectly well settled that the contributory negligence of a third party is no defense, where the defendant has also been guilty of negligence without which the damage would not have been sustained. Eaton *v.* Boston & Lowell Railroad, 11 Allen, 500. The extent of the defendant's responsibility cannot therefore be conclusively determined by the rule of Marble *v.* Worcester, because the limits of liability under the statute as to defects in public ways and at common law for negligence are not identical. These cases against towns can be reconciled with the general principles of the law only by the consideration that they depend exclusively on a statute provision, within the terms of which they are strictly confined.

Opinions upon questions of marine insurance are frequently quoted to illustrate the meaning of the maxim, *causa proxima non remota spectatur*. The exigencies of the present decision do not require an elaborate examination of the doctrine in its application to the law of insurance; but a few observations may be useful. Where the immediate cause of loss is a peril insured against, the underwriters are not exonerated by the fact that its original cause was something not covered by the policy. They are liable if the loss ends in a peril insured against, although it began in some other cause. Thus, a loss arising immediately from a peril of the sea, but remotely from the negligence of the master, is protected by the policy; but it by no means follows that, in an action brought against the owner or master for such negligence, the consequent loss of the cargo could not be included in the measure of damages. Redman *v.* Wilson, 14 M. & W. 476. On the contrary, where a master unnecessarily deviated from his voyage, and during the devia-

tion a cargo of lime was wet by a tempest, and the bark was thereby set on fire and consumed, the owner was held liable for the fault of his agent the master, and the deviation was deemed to be sufficiently the proximate cause of the loss of the cargo. Davis v. Garrett, 6 Bing. 716. In a recent insurance cause, one learned judge, Willes, J., said: "The ordinary rule of assurance law is, that you are to look to the proximate and immediately operating cause, and to that only;" and another, Erle, C. J., said: "The words are to be construed with reference to the known principle pervading insurance law, *causa proxima non remota spectatur*; the loss must be connected with the supposed cause of it, and in the relation of cause and effect, speaking according to common parlance." Ionides v. Universal Ins. Co., 8 Law Times (N. S.) 705. Marsden v. City and County Ass. Co., Law Rep. 1 C. P. 232. But in an action for damages for refusing to receive a ship into a dock, the rule was said to be "that the damage must be proximate (not immediate) and fairly and reasonably connected with the breach of contract or wrong. As to what is so, different minds will differ." Wilson v. Newport Dock Co., Law Rep. 1 Exch. 186.

Perhaps the truth may be that a maxim couched in terms so general as to be necessarily somewhat indefinite has been indiscriminately applied to different classes of cases in different senses, or at least without exactness and precision; and that this is the real explanation of the circumstance that *causa proxima*, in suits for damages at common law, extends to the natural and probable consequences of a breach of contract or tort; while in insurance cases and actions on our highway statute it is limited to the immediately operating cause of the loss or damage. If this be so, the frequent reference to the maxim in cases like the present is not particularly useful, and certainly not conducive either to an accurate statement of principles or to uniform and intelligible results. In insurance causes the maxim is resorted to as furnishing a rule by which to determine whether a loss is attributable to a peril against which the contract has promised indemnity, and its application charges as frequently as it exonerates the underwriter. Peters v. Warren Insurance Co., 3 Sumner, 389; S. C. 14 Pet. 99. Hillier v. Allegheny County Ins. Co., 3 Penn. State R. 470. The limits of liability and the definition of proximate cause in the law of insurance are too narrow and restricted to be applied to the present case.

Definitions and illustrations drawn from other branches of the law may afford instructive analogies, but for controlling authorities we are to look to adjudications in actions of a similar nature to the present, and arising upon a state of facts more closely resembling those now under consideration. Here the defendant is alleged to have been guilty of culpable negligence. And his liability depends, not upon any contract or statute obligation, but upon the duty of due care which every man owes to the community, expressed by the maxim *sic utere tuo ut alienum non lædas*.

Where a right or duty is created wholly by contract, it can only be enforced between the contracting parties. But where the defendant has violated a duty imposed upon him by the common law, it seems just and reasonable that he should be held liable to every person injured, whose injury is the natural and probable consequence of the misconduct. In our opinion this is the well-established and ancient doctrine of the common law, and such a liability extends to consequential injuries, by whomsoever sustained, so long as they are of a character likely to follow, and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act. The damage is not too remote if according to the usual experience of mankind the result was to be expected. This is not an impracticable or unlimited sphere of accountability, extending indefinitely to all possible contingent consequences. An action can be maintained only where there is shown to be, first, a misfeasance or negligence in some particular as to which there was a duty towards the party injured or the community generally; and, secondly, where it is apparent that the harm to the person or property of another which has actually ensued was reasonably likely to ensue from the act or omission complained of.

Two recent cases, both much considered, sound and consistent with each other, well illustrate the true rule of law. A druggist who carelessly labeled belladonna, a deadly poison, as extract of dandelion, a harmless medicine, and sent it so labeled into the market, was held, by the Court of Appeals in New York, liable in damages, after it had passed through several intervening hands, had been purchased of an apothecary, and administered by the plaintiff to his wife, who was injured by using it as a medicine in consequence of the false label. Thomas *v.* Winchester, 2 Selden, 397. Here the dealer owed to the public a duty not to expose human life to danger by falsely labeling a noxious drug and selling it in the market as a harmless article. To do so was culpable and actionable negligence towards all likely to be, and who in fact were, injured by the mistake. And the injury that did follow was the natural and easily foreseen result of the carelessness.

On the other hand, where one article, black oxide of manganese, in itself harmless, which became dangerous only by being combined with another, was sold by mistake, the plaintiff who purchased it of a third party and mixed it with another substance, the combination with which caused a dangerous explosion, was held by this court to have no right of action against the original vendor who made the mistake, for the damages caused by the explosion. Davidson *v.* Nichols, 11 Allen, 514. The mistake in regard to an article in its own nature ordinarily harmless, in the absence of contract or false representation, was not a violation of any public duty, or negligence of such a wrongful and illegal character as to render the party who made it liable for its consequences to third persons. Nor was it a natural and prob-

able consequence of such a mistake that this ordinarily innocuous substance would be mixed with another chemical agent, become explosive by the combination, and a third party be thereby injured.

It is clear from numerous authorities that the mere circumstance that there have intervened, between the wrongful cause and the injurious consequence, acts produced by the volition of animals or of human beings, does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence as a result which might reasonably have been foreseen as probable, the legal liability continues.

There can be no doubt that the negligent management of horses in the public street of a city is so far a culpable act that any party injured thereby is entitled to redress. Whoever drives a horse in a thoroughfare owes the duty of due care to the community, or to all persons whom his negligence may expose to injury. Nor is it open to question that the master in such a case is responsible for the misconduct of his servant.

Applying these principles more closely to the facts set forth in this declaration and admitted by the demurrer, we find that by careless driving the defendant's sled was caused to strike against the sleigh of one Baker with such violence as to break it in pieces, throwing Baker out, frightening his horse, and causing the animal to escape from the control of its driver and to run violently along Tremont Street round a corner, near by, into Eliot Street, where he ran over the plaintiff and his sleigh, breaking that in pieces and dashing him on the ground. Upon this statement, indisputably the defendant would be liable for the injuries received by Baker and his horse and sleigh. Why is he not also responsible for the mischief done by Baker's horse in its flight? If he had struck that animal with a whip and so made it run away, would he not be liable for an injury like the present? By the fault and direct agency of his servant the defendant started the horse in uncontrollable flight through the streets. As a natural consequence, it was obviously probable that the animal might run over and injure persons traveling in the vicinity. Every one can plainly see that the accident to the plaintiff was one very likely to ensue from the careless act. We are not therefore dealing with remote or unexpected consequences, not easily foreseen nor ordinarily likely to occur, and the plaintiff's case falls clearly within the rule already stated as to the liability of one guilty of negligence for the consequential damages resulting therefrom.

These views are fortified by numerous decisions, to a few of which it may be expedient to refer. It was recently held by this court that

when a horse was turned loose on the highway, and there kicked a colt running by the side of its dam, the owner of the horse was liable for that damage. Barnes *v.* Chapin, 4 Allen, 444. We cannot distinguish between the different ways of letting a horse loose upon the street; whether by leaving him there untied, or leaving a gate open, or, as in the present case, by driving against him, and thus causing him to run away. In Powell *v.* Deveney, 3 Cush. 300, the defendant's servant left a truck standing beside a sidewalk in a public street, with the shafts shored up by a plank in the usual way. Another truckman temporarily left his loaded truck directly opposite on the other side of the same street, after which a third truckman tried to drive his truck between the two others. In attempting to do so with due care, he hit the defendant's truck in such a manner as to whirl its shafts round on the sidewalk so that they struck the plaintiff who was walking by, and broke her leg. For this injury she was allowed to maintain her action, the only fault imputable to the defendant being the careless position in which the truck was left by his servant on the street, which was treated as the sole cause of the breaking of the plaintiff's leg, and in legal contemplation sufficiently proximate to render the defendant responsible. See also Powell *v.* Salisbury, 2 Yo. & Jer. 391; Vandenburg *v.* Truax, 4 Denio, 464; Rigby *v.* Hewitt, 5 Exch. 240; Greenland *v.* Chaplin, Ib. 245; Morrison *v.* Davis, 20 Penn. State R. 175; Lynch *v.* Nurdin, 1 Q. B. 29; Thomas *v.* Winchester, *ubi supra*, and cases there cited. When a horse strayed on the highway and there viciously and violently kicked a child, the owner was held not liable in the absence of evidence that he knew the animal was in the habit of kicking; because the act was not one which it was in the ordinary course of nature for a horse of common temper and disposition to do. Cox *v.* Burbidge, 32 Law Journ. (N. S.) C. P. 89. See also Cooke *v.* Waring, Ib. Exch. 262. But two years later the same court held a defendant liable who had negligently left insecure a gate which he was bound to repair, in consequence of which his horse strayed into the field of an adjoining proprietor and there kicked another horse; because this was the natural consequence of two horses meeting under such circumstances, and such an injury produced by such an animal was deemed to be the proximate consequence of the defendant's negligence. Lee *v.* Riley, 34 Law Journ. (N. S.) C. P. 212. See also Reed *v.* Edwards, Ib. C. P. 31. In a case where the defendant left on the street exposed for sale a machine for crushing oil cake between rollers, into the cogs of which a little child put his fingers while another boy turned the handle, and the fingers were crushed, the court held that the act was too remote; and Bramwell, B., said: "The defendant was no more liable than if he had exposed goods colored with a poisonous plant, and the child had sucked them;" but the same Baron added, "Further I can see no evidence of negligence in him. If his act in exposing this machine was negligence, will his act in exposing it again be called wilfully mischievous? If

that could not be said, then it is not negligence, for between negligence and wilful mischief there is no difference but of degree." Mangan v. Atherton, Law Rep. 1 Exch. 239. This case has no tendency and indicates no intention to overrule Dixon v. Bell, 5 M. & S. 198, in which, an injury having been received from a loaded gun, Lord Ellenborough held the owner liable for leaving a dangerous instrument in a state capable of doing mischief, although the mischief was caused by a girl taking it up, pointing it at a child, and snapping the trigger after the priming had been withdrawn.

It may not always be easy to determine whether any particular act of negligence is of such a character as to render the party guilty of it liable to third persons; or whether the ensuing consequences are so far natural and probable as to impose a liability for them in damages. Cases may be put, falling very near the dividing line, and no rule can be laid down in advance, which will determine all with precision. But the difficulty of applying a principle is a poor argument against its validity, unless one more satisfactory can be proposed in its stead. There may be discrepancies and want of uniformity in the application of the principle to the facts of particular cases, but all the authorities cited concur in the support of the doctrine we have stated, and agree as to the rule by which the extent of liability for consequential damages resulting from negligence ought to be determined.

In the opinion of a majority of the court, the demurrer in the present case must be overruled, because on the statements of the declaration the plaintiff's injury does not appear to be so remote from the negligence of the defendant as to exonerate the latter from liability. When such a question is raised by the pleadings, or arises upon agreed or undisputed facts, it is matter of law; but where the evidence is contradictory, or the inferences to be drawn from it are uncertain, the jury must determine by a verdict whether the facts fall within the rule of law to be laid down on the subject. Wilson v. Newport Dock Co., *ubi supra*.[1]

Demurrer overruled.

[1] See also Williams v. San Francisco & N. Ry., 6 Cal. App. 715, 93 Pac. 122; Boone County v. Mutchler, 137 Ind. 140, 36 N. E. 534; Lake v. Milliken, 62 Me. 240; Pennsylvania Steel Co. v. Wilkinson, 107 Md. 574, 69 Atl. 412; Rompillon v. Abbott, 49 Hun, 607, 1 N. Y. Supp. 662; Burrell v. Uncapher, 117 Pa. 353, 11 Atl. 619; Quinlan v. Philadelphia, 205 Pa. 309, 54 Atl. 1026; Shippers' C. & W. Co. v. Davidson, 35 Tex. Civ. App. 558, 80 S. W. 1032; Snyder v. Philadelphia Co., 54 W. Va. 149, 46 S. E. 366. — Ed.

BELK v. PEOPLE.

SUPREME COURT OF ILLINOIS. 1888.

[*Reported* 125 *Ill.* 584.]

SHOPE, J. The plaintiffs in error, John Belk, John Hill, and George Williams, with George Belk, were jointly indicted, in the Jo-Daviess Circuit Court, for the murder of Ann Reed, the indictment charging in the various counts, in varying forms, that the murder was committed by the defendants, by wilfully, recklessly, negligently, wrongfully and feloniously driving a team of horses hitched to a wagon, upon and against a wagon in which the deceased was riding, thereby causing the horses attached to the wagon in which she was so riding, to run away, thereby throwing said Ann Reed upon the ground, whereby she received wounds and injuries from which she died the following day. A trial resulted in an acquittal of said George Belk, and a verdict of guilty of manslaughter as to plaintiffs in error, and fixing their punishment at confinement in the penitentiary at one year each. Motions for new trial and in arrest were severally overruled, and sentence pronounced by the court upon the verdict.

The facts immediately connected with the killing of Mrs. Reed, in reference to which there is little or no controversy, are as follows: On the 5th day of July, 1886, a celebration of the fourth of July was held in a grove about a half mile from the village of Elizabeth, in Jo Daviess County. The grove was a quarter of a mile from the public highway, and was reached through a lane about one rod wide and fifty rods long, extending from the road into the fields in which the grove was situated. This lane, ordinarily closed by gates at each end, was on this day thrown open and used by the public. About six rods from the gate nearest the grove was a hollow or depression crossing the lane, the descent into which, by the road, was quite steep, and at this point, owing to the unevenness of the surface of the land, a team could not be driven aside to permit another to pass. About six o'clock P. M. the deceased, with others, started homeward, through this lane, in a spring wagon or "hack" drawn by two horses, driven by her son Richard. About the same time, plaintiffs in error, in company with George Belk, also started from the grove, in a like vehicle, also drawn by two horses driven by the defendant John Belk. At the time the latter entered the narrow lane the former was some six rods in advance, and in plain view. About the time of so entering the lane, the horses driven by Belk began to run, and ran into and against the wagon in which the deceased was riding, breaking the end-gate and the back of the seat. The collision occurred just as the forward conveyance was descending the declivity into the hollow mentioned. The

result was that the horses attached to the vehicle in which Mrs. Reed was riding became unmanageable, and ran away, whereby she was thrown violently to the ground, and was injured so that she died the next day.

Some question is made whether the collision was the proximate cause of the team running away, and of the injury and death of Mrs. Reed; but it is enough to say, the evidence was sufficient upon which to base the finding of the jury in that respect. The question was submitted under proper instructions, and there is no ground for disturbing the verdict for that reason. There was direct causal connection between the collision and the death of the deceased. Between the acts of omission or commission of the defendants, by which it is alleged the collision occurred, and the injury of the deceased, there was not an interposition of a human will acting independently of the defendants, or any extraordinary natural phenomena, to break the causal connection. It may be fairly said that what followed the colliding of the defendants' team with the wagon in which the deceased was riding, was the natural and probable effect of the collision, and the collision was in consequence of the manner in which the team of the defendants was controlled. It can make no difference whether the driver of the team after which the deceased was riding, was guilty of negligence in not controlling or failing to control his team after the collision. It may be that persons standing by, or the driver, might, by the exercise of diligence and care, have checked the horses, and thereby prevented the final catastrophe; but because they did not do so, and were derelict in moral or even legal duty in that regard, will not release defendants from the responsibility of their wrongful act or omission of their legal duty. If the driver, instead of being negligent, as is claimed, in controlling his team, had done some act contributing to the running away of his horses, or driven upon a bank, whereby the carriage had been overturned and the deceased thrown out, or the like, it might justly be said that it was the act of the driver, and not of the defendants, to which the death of the deceased was legally attributable. Wharton on Crim. Law, 341, *et seq.*; Roscoe on Crim. Ev. 700, *et seq.*

EBERHARDT *v.* GLASCO MUTUAL TELEPHONE ASSOCIATION.

SUPREME COURT OF KANSAS, 1914. 3197 2nd

[*Reported* 139 *Pac. Rep.* 416.]

WEST, J. (1) The plaintiff sued for damages received by being thrown from a wagon in a runaway. Her husband was driving a span of mules on a public highway when an automobile passed them on the south, frightening the mules, and they, leaving the traveled roadway,

veered to the right and ran the wagon across a pole or guy wire belonging to the defendant, throwing the plaintiff out, and injuring her. The pole was about on the north line of the highway, and formed a part of the fence, and the guy wire extended from the pole about 4 feet southeast, where it was attached to a rod anchored in the ground. The road from fence to fence is 44 feet wide, the traveled portion being about 30 feet wide, and on each side between the driveway and the fence is an embankment not used for travel. This embankment where the injury occurred is only about 6 inches higher than the roadway. It was not graded or smoothed, but was covered with grass and weeds. The husband testified that the team ran about 100 feet, and swung to the right and hit the guy wire with the front wheel of the wagon; that it was 4 feet and 4 inches to the pole from where the guy wire entered the ground, that he could have held the team had it not been for this obstruction, and would have had them under control in a little while. There was testimony that the team had tried to run away before; also that they ran about 20 rods before the accident occurred. It is claimed that the defendant was negligent in placing and maintaining the pole and wire at the place and in the manner indicated, and that they constituted a nuisance, and were the proximate cause of the injury. The court sustained a demurrer to the plaintiff's evidence and, having refused a new trial, the plaintiff appeals.

The defendant denies that the pole and wire were negligently placed, and that they were the proximate cause of the injury. We find no authority for holding that the location of the pole practically on the boundary line of the highway could be deemed negligence on the part of the defendant. Whether the guy wire was so placed and anchored as to constitute negligence is a question on both sides of which much could be said, but one we do not deem necessary to decide. Unless the guy wire was the proximate cause of the injury, there can be no liability, whether its location were negligent or otherwise.

(2) The question of proximate cause is one frequently so near the border line as to cause much perplexity; but, generally speaking, it may be said in this State that the proximate is the producing cause, not the one supplying the condition, but the one producing the injury. The one supplying the condition may be so intrinsically careless as to amount practically to a continuing invitation, so to speak, for a direct cause to join in producing a disastrous result. But to be such it must present a condition of danger so manifest that the one responsible must be held to have been negligent in furnishing the means for a probable injury. But a condition which could not reasonably be expected to endanger, and which, but for some independent cause without which the injury would not have occurred, would not have endangered, does not ordinarily amount to a proximate cause. It is entirely plain that, had the mules not become frightened, and had they not also got beyond the driver's control, the wire would have had no possible con-

nection with the most regrettable injury. The party placing the wire 4 feet and 4 inches from the pole in the grassy embankment north of the traveled portion of the road cannot be held to have foreseen that a team might become frightened 20 rods east thereof and run upon the embankment. Had the automobile not passed, had it not scared the team, had they not pulled out of the road in spite of the driver's efforts to keep them in it, no harm would have come from the wire, and to hold the company placing it there liable would be to charge it with the duty to foresee all these most uncommon and unlooked for conditions.

While the plaintiff cites decisions from other States which support or tend to support her position, attention is also called to Street Ry. Co. *v.* Stone, 54 Kan. 83, 37 Pac. 1012, and Mosier *v.* Butler Co., 82 Kan. 708, 109 Pac. 162. In the Stone Case the horse took fright at an object for which the city was not responsible, and got beyond the control of the driver, and came in contact with an obstruction in the street which the city had been negligent in not removing or repairing, and the city was held liable. There the obstruction was in the opened and traveled portion of the street, and a duty rested upon the city to keep it in a reasonably safe condition for travel. It is clear that the defect or obstruction was such as likely to cause damage. Hence the facts are by no means like those involved here. In the Mosier Case it was said (82 Kan. 709, 109 Pac. 162) that the frightening of the horse and the defect in the guard rail were related in their operation, and the injury would not have resulted if the guard rail had not been defective. From the facts there shown, the absence of a sufficient guard rail provided a constant condition if not a source of danger liable and likely to happen at any time.

The appellee cites many decisions; but we will notice only those which seem most directly in point. In Railway Co. *v.* Bailey, 66 Kan. 115, 71 Pac. 246, a horse, becoming frightened at a mass of escaping steam, ran upon a pile of sewer pipe, overturning the buggy, and injuring the plaintiff. In the opinion it was said: "The proximate cause of the injury — that without which it would not have occurred — was the frightening of the horse. This stood first in the line of causation." 66 Kan. 122, 71 Pac. 248. In Stephenson *v.* Corder, 71 Kan. 475, 80 Pac. 938, 69 L. R. A. 246, 114 Am. St. Rep. 500, the defendant's team standing — one of them hitched — at a hitching rail became frightened by a boy who, in exercising on the hitch rail, struck one of the horses on the nose with his foot, causing them to rear back and break loose. They collided with a buggy, injuring the plaintiff, who sued the owner of the team, alleging that he left them standing insecurely hitched. A judgment in her favor was reversed, on the ground that the act of the boy frightening the team was the proximate cause, and that the defect in the halter, if any, was only a distinct cause unrelated in operation with the producing cause. The definition of proximate cause there approved (71 Kan. 479, 80 Pac. 938, 69 L. R. A.

246, 114 Am. St. Rep. 500) was such negligence as under the circumstances ordinary prudence would have admonished the person sought to be charged that his act or omission would probably result in injury to someone; the general test being whether the negligence is such that a person of ordinary intelligence should have foreseen that an accident was likely to be produced thereby. In Gas Co. *v.* Dabney, 79 Kan. 820, 101 Pac. 488, it was held that the acts of the defendants did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, and hence they were not liable. It was expressly held that, when the facts are undisputed, and the court can see that the resulting injury was not probable, but remote, it is its duty to determine the question, and not send it to a jury. In Colwell *v.* Parker, 81 Kan. 295, 105 Pac. 524, the operator of a moving picture show and the manufacturer and lessor of the steps leading to the entrance were sued for damages caused by falling from the steps for the alleged reason that they were not provided with railings or guards. It was held that the manufacturer and lessor, even if negligent in the manner of construction, was not liable; such negligence being remote and unrelated in its operation to the direct proximate cause, and doing nothing more than to furnish the condition or give rise to the occasion by which the injury was made possible. The law concerning proximate cause was exhaustively considered in Rodgers *v.* Railway Co., 75 Kan. 222, 88 Pac. 885, 10 L. R. A. (N. S.) 658, 121 Am. St. Rep. 416, 12 Am. Cas. 441, and the rule already indicated finds abundant support in that decision.

We are compelled to hold, therefore, that the demurrer to the plaintiff's evidence was properly sustained, and such ruling is

Affirmed.

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ISHAM *v.* DOW.

SUPREME COURT OF VERMONT, 1898.

[*Reported* 70 *Vt.* 588.]

ROWELL, J. Dow, the intestate, a poor gunner, as he knew, with eyesight much impaired, knowing that the plaintiff and her children were alone in her husband's house, unlawfully, wantonly, and maliciously shot at and wounded her husband's dog, lying peaceably in close proximity to the house on the land of a third person, whereupon the dog sprang up, rushed wildly and rapidly towards the house, entered it through an open door into the room where the plaintiff was, ran violently and forcibly against her, knocking her down and injuring her; and the question is, whether the estate is liable for it.

The defendant says that in order to recover the plaintiff must establish two things, namely, negligence on the part of Dow, and that

her injury resulted proximately therefrom, and that the case shows neither, as it does not show that Dow owed her any legal duty, nor that his act was the proximate cause of the injury.

But we cannot adopt this view. The intestate unlawfully, wantonly, and maliciously shot at the dog, intending, we will assume, to kill it, but not knowing whether he would or not, and not knowing what would happen if he did not, and by his wanton act the dog was set wildly in motion, and that motion, thus caused, continued, without the intervention of any other agency, and without power on his part to control it, until the plaintiff's injury resulted therefrom. In these circumstances the law treats the act of the intestate as the proximate cause of the injury, whether the injury was, or could have been, foreseen or not, or was or not the probable consequence of the act, for the necessary relation of cause and effect between the act and the injury is established by the continuous and connected succession of the intervening events.

This is the universal rule when the injurious act is wanton. In 16 Am. and Eng. Ency. of Law, 434, the true principle is said to be, that he who does such an act is liable for all the consequences, however remote, because the act is *quasi* criminal in its character, and the law conclusively presumes that all the consequences were foreseen and intended. But it is not necessary in this State, certainly, that the act should be wanton in order to impose liability for all the injurious consequences. If it is voluntary and not obligatory it is enough. In Vincent *v.* Stinehour, 7 Vt., at p. 66, it is said that for such an act the doer is answerable for any injury that may happen by reason thereof, whether by accident or carelessness. In Wright *v.* Clark, 50 Vt. 130, the defendant shot at a fox that the plaintiff's dog had driven to cover; and accidentally hit the dog, and he was held liable, because the shooting at the fox was voluntary, and furnished no excuse for hitting the dog, though he did not intend to hit him. The same rule was applied at *nisi prius* without exception in Taylor *v.* Hayes, 63 Vt. 475, where the defendant shot at a partridge and accidentally hit a cow. So in Bradley *v.* Andrews, 51 Vt. 530, the defendant voluntarily discharged an explosive missile into a crowd and hurt the plaintiff, and it was held that, as the act was voluntary and wrongful, the defendant was liable, and that his youth and inexperience did not excuse him.

The rule is the same here in negligence cases, and may be formulated thus: When negligence is established, it imposes liability for all the injurious consequences that flow therefrom, whatever they are, until the intervention of some diverting force that makes the injury its own, or until the force set in motion by the negligent act has so far spent itself as to be too small for the law's notice. But in administering this rule, care must be taken to distinguish between what is negligence and what the liability for its injurious consequences. On the question of what is negligence, it is material to consider what a prudent man might reasonably have anticipated; but when negligence is once estab-

lished, that consideration is entirely immaterial on the question of how far that negligence imposes liability. This is all well shown by Stevens *v.* Dudley, 56 Vt. 158, and Gilson *v.* The Delaware & Hudson Canal Co., 65 Vt. 213. The rule is the same in England, as will be seen by referring to the leading case of Smith *v.* The London & South-Western Railway Co., L. R. 6 C. P. 14, in the Exchequer Chamber. In Sneesby *v.* The Lancashire & Yorkshire Railway Co., L. R. 1 Q. B. D. 42, a herd of plaintiff's cattle were being driven along an occupation road to some fields. The road crossed a siding of the defendant's railway on a level, and when the cattle were crossing the siding the defendant's servants negligently sent some trucks down the siding amongst them, which separated them from the drovers and so frightened them that a few rushed away from the control of the drovers, fled along the occupation road to a garden some distance off, got into the garden through a defective fence, and thence on to another track of the defendant's railway and were killed; and the question was whether their death was not too remote from the negligence to impose liability. The court said that the result of the negligence was twofold: first, that the trucks separated the cattle, and second, that the cattle were frightened and became infuriated and were driven to act as they would not have done in their natural state; that everything that occurred or was done after that must be taken to have occurred or been done continuously; and that it was no answer to say that the fence was imperfect, for the question would have been the same had there been no fence there. Then liability was made to depend not on the nearness of the wrongful act, but on the want of power to divert or avert its consequences; and it continued until the first impulse spent itself in the death of the cattle. See Ricker *v.* Freeman, 50 N. H. 420; 9 Am. Rep. 267; Alabama, etc., R. R. Co. *v.* Chapman, 80 Ala. 615.

Ellis *v.* Cleveland, 55 Vt. 358, is not in conflict with the Vermont cases above cited, as is supposed, for there there was no casual connection between the wrongful act and the injury complained of, and so there could be no recovery. As illustrative of non-liability for damage flowing from an intermediate and independent cause operating between the wrongful act and the injury, see Holmes *v.* Fuller, 68 Vt. 207.

Ryan *v.* The New York Central R. R. Co., 35 N. Y. 210, is relied on by the defendant. The Pennsylvania R. R. Co. *v.* Kerr, 62 Pa. St. 353, is a similar case. It is said in Milwaukee, etc., R. R. Co. *v.* Kellogg, 94 U. S., at p. 474, that these cases have been much criticised; that if they were intended to hold that when a building has been negligently set on fire, and a second building is fired from the first, it is a conclusion of law that the owner of the second has no remedy against the negligent wrongdoer, they have not been accepted as authority for such a doctrine even in the State where they were made, and are in conflict with numerous cases in other jurisdictions. Judge Redfield says in 13 Am. Law Reg. N. S. 16, that these cases have not been coun-

tenanced by the decisions in other States. And Judge Cooley says that a different view prevails in England and most of the American States; that the negligent fire is regarded as a unity; that it reaches the last building as a direct and proximate result of the original negligence, just as a rolling stone put in motion down a hill, injuring several persons in succession, inflicts the last injury as a proximate result of the original force as directly as it does the first, though if it had been stopped on the way and started again by another person, a new cause would thus have intervened, back of which any subsequent injury could not be traced; that proximity of cause has no necessary connection with contiguity of space nor nearness of time. Cooley on Torts (1st ed.), 76.

Judgment reversed and cause remanded.

TOWALIGER FALLS POWER CO. v. SIMS.

COURT OF APPEALS, GEORGIA, 1909. 261 Ft 2nd

[*Reported* 6 *Ga. App.* 749.]

POWELL, J. Sims sued the Towaliger Falls Paper Company, alleging that during the year 1906 he was a tenant residing on certain lands in Monroe County, that the defendant built a high dam across the Towaliger River, some distance below his residence, and backed a large body of water on and over a great area of land near his home; that the land so submerged was covered with trees and other vegetation; that the ponding of this water and the submerging of the vegetation caused malaria. . . . By amendment he set up . . . that mosquitoes which were bred in the pond, and which had not previously infested it, became a medium for the transmission of malaria, and did transmit it to himself and his family, causing them to have malarial fever, which they otherwise would not have had. He prayed for damages on account of the injury to the use of his premises, on account of his own sickness, pain, and suffering, on account of the loss of the services of his wife and minor children, and on account of expenses incurred in connection therewith.[1]

One of the contentions of the plaintiff in error is that if, as the testimony of the expert witnesses strongly indicated, the malarial fever with which the plaintiff and his family, according to his testimony, suffered was produced in them by the bite of a particular kind of mosquito, which was harmless and incapable of carrying the disease unless it had first bitten some other human being already infected with malaria, the relation between the maintenance of the pond, even though

[1] Only so much of the opinion as discusses this amendment is given. — ED.

it afforded a place for the breeding of the mosquitoes, and the final communication of the disease to the plaintiff, was too remote. Counsel ingeniously and, we suspect, somewhat facetiously, argue that the mosquito is an animal *feræ naturæ*, and that in an action for damages done by a dangerous animal, scienter on the part of the person harboring it is a necessary allegation; citing Cox *v.* Murphey, 82 Ga. 623 (9 S. E. 604), and Clarendon *v.* McClelland, 89 Tex. 483 (31 L. R. A. 669, 59 Am. St. 70, 34 S. W. 98, 35 S. W. 474). Without making any specific classification of mosquitoes, we hold that they are a common pest, and that the maintenance of a place where they breed in unusual numbers is such a menace to persons residing nearby as to make that place ordinarily a nuisance; and that if, as a result of the maintenance of such a place, the mosquitoes do in fact breed there, as they otherwise would not have bred, and become inoculated with malaria, and, in accordance with what is naturally to be expected, fly abroad and communicate malarial fevers, the proprietor of the breeding place is, in legal contemplation, proximately the author of the damage.

SECTION IV.

Interposition of an Act of the Injured Individual.

1047 2nd

REX *v.* DE MARNY.

COURT FOR CROWN CASES RESERVED. 1906.

[*Reported* 1907, 1 *K. B.* 388.]

CASE stated for the opinion of the Court for the Consideration of Crown Cases Reserved by the Common Serjeant.

The defendant was tried at the Central Criminal Court on an indictment charging him in several counts with selling and publishing, and causing and procuring to be sold and published by certain named persons, divers obscene books, papers, and photographs. The indictment also contained a series of counts charging him with sending, and causing and procuring to be sent by certain named persons, certain postal packets containing obscene books, papers, and photographs contrary to the Post Office (Protection) Act, 1884 (47 & 48 Vict. c. 76), s. 4.

It was proved that the defendant was the editor of a newspaper called *Judy*, and that he inserted and published in that newspaper advertisements of several persons in England and abroad, offering for sale books, catalogues, and photographs. The chief inspector of

police wrote to the addresses given in the advertisements and received in return from the persons or firms mentioned in the indictment, who were all resident abroad, postal packets containing books, catalogues, and photographs of the most obscene character. The defendant had been warned several times by the police authorities that the books, photographs, and other things advertised in his paper in the same terms and by the same persons were of an obscene character, and that one of the persons so advertising in his newspaper had been convicted for selling and publishing obscene libels. Counsel for the defendant submitted that there was no evidence to go to the jury that the defendant took part in or aided and abetted the selling and publishing of obscene libels as charged in the indictment.

The Common Serjeant held that there was evidence, and directed the jury that if they were satisfied that the books and photographs sent to the police inspector in pursuance of the advertisements were obscene, and that the defendant knew at the time he published the advertisements that they were advertisements for the sale of obscene literature and photographs, and that by the publication of these advertisements he brought about the sale and transmission to the inspector of the books and photographs, they ought to convict the defendant, although he did not know the actual contents of the books or the details of the photographs sent, and that in judging of the defendant's knowledge they might consider not only the evidence of the express warnings given to the defendant and the wording of each advertisement, but also the other advertisements appearing in the same issue of the paper.

The jury found the defendant guilty on all counts.

The question for the opinion of the Court was whether the conviction was right on all or any of the counts of the indictment.

Avory, K. C., and *J. P. Grain*, for the defendant. The conviction cannot stand. If the defendant is guilty, he is guilty of aiding and abetting the sale and publication of the indecent literature, and, the offence being a misdemeanour, he is liable to be indicted as a principal in the second degree; but the real vendors, who are the principals in the first degree, are all foreigners resident abroad, and they committed no offence against the English law in sending indecent literature to this country. If the act done by the principal in the first degree is one for which he could not be convicted, it follows that the principal in the second degree has been guilty of no offence. Further, by publishing the advertisements the defendant cannot be said to have procured in the legal sense the publication of the books sold, any more than a sandwich-man who advertises the performance of a stage play in a music-hall commits the offence of procuring the illegal representation of a stage play. Reliance is placed by the prosecution on the fact that the defendant knew that the advertisements related to obscene matter, but that knowledge is not evidence that he aided and abetted or procured the sale of the particular things specified in the indictment. In

other words, the insertion of the advertisements, though it may have assisted the sale in a commercial sense, is legally too remote from the commission of the offence to constitute the editor of the newspaper an aider or abettor in the offence.

R. D. Muir and *L. W. Kershaw*, for the prosecution. It is a fallacy to say that the principals in the first degree in this case have committed no offence. The person abroad, whether a foreigner or not, who through his innocent agent, the postman, causes the publication of indecent literature in this country commits an offence against the law of England, and, if he came within the jurisdiction, could be convicted: Rex *v.* Oliphant, [1905] 2 K. B. 67. The act of sending the books and photographs through the post is one continuous act, one portion of which is performed by the foreigner abroad and another by the postman in England, but the act of sending continues right up to the moment of delivery. In Rex *v.* Burdett, (1820) 1 St. Tr. (N. S.) 1, at pp. 114, 115; 4 B. & Ald. 95, where a libel was written by the defendant in one county and delivered by the postal authorities in another, it was held that there was a publication by the defendant in the latter county; and at the date of that decision the same question arose as between different counties as now arises between England and a foreign country. Then, is there any evidence that the defendant aided and abetted or procured the sale or publication within s. 8 of the Aiders and Abettors Act. 1861 (24 & 25 Vict. c. 94)? The foreigner abroad desires to get customers in England. He can do so either by employing an agent or by advertising. In either case the effect is the same. The advertisement in the present case afforded that aid without which the vendor could not have committed the illegal act. The defendant knew that the advertisements related to indecent literature, and that sales would or might result from their insertion in his paper. It is immaterial that he may not have known the exact books or photographs that would be sold: Reg. *v.* Cooper, (1846) 8 Q. B. 533; Parkes *v.* Prescott, (1869) L. R. 4 Ex. 169.

[He was stopped.]

Avory, K. C., replied.

Lord Alverstone, C. J. The very able arguments which have been delivered on both sides enable me to come without any doubt to the conclusion that this conviction must be affirmed. The defendant for profit to himself inserted in his paper advertisements which give information to readers as to where certain publications can be obtained, and it is found as a fact that the defendant knew that the books and other things advertised were of an indecent character, and if one were at liberty to draw a conclusion from the advertisements themselves, there could be no doubt at all as to that. The Common Serjeant directed the jury in the following terms: [His Lordship read the direction of the Common Serjeant set out above, and continued: —] In my opinion

that direction is stated as favourably as it could be for the defendant. The jury are told that in order to convict the defendant they must be satisfied that the defendant knew the character of the publications referred to in the advertisements, and that by publishing the advertisements he brought about the sale of the publications and other articles referred to. That amounts in ordinary language to aiding or abetting the publication in England of obscene literature, and the sending through the post in England a packet the sending of which is prohibited by the Post Office (Protection) Act, 1884. It would, in my opinion, be a lamentable state of things if the law of this country were not strong enough to deal with a man who has done so much towards bringing about the publication of indecent literature. The evidence in this case shews that the result of the insertion of the advertisements in the defendant's paper was to give information as to where these things could be obtained to persons who, but for the advertisements, would or might never have known of their existence, and, therefore, it is not going too far to say that the publication was directly brought about by the act of the defendant, and it is further proved that the defendant had knowledge that that would be the consequence of inserting the advertisements in the paper. The argument which has been urged on behalf of the defendant seems to me to go too far, because it would equally apply if the defendant had himself caused the books to be printed abroad. In my opinion the direction of the Common Serjeant was in accordance with the law, and the cases of Rex *v.* Oliphant, *supra*, Rex *v.* Burdett, *supra*, and Reg. *v.* Cooper, *supra*, are all authorities which afford illustration of the same principle, that in misdemeanours persons who, in the words of the statute, "aid, abet, counsel or procure" the commission of an offence are themselves principal offenders.

GRANTHAM J. I am of the same opinion. I doubted at first whether the law was strong enough to make the person who received money for publishing these advertisements liable in the same way as a person who himself sells indecent literature, but the authorities which have been cited to us by Mr. Muir satisfy me that the learned Common Serjeant rightly directed the jury. The conviction must therefore be affirmed.

LAWRANCE, BIGHAM and BUCKNILL, JJ., concurred.

Conviction affirmed.

1922 and

BURK v. CREAMERY PACKAGE MANUFACTURING CO.

SUPREME COURT OF IOWA, 1905.

[*Reported* 126 *Ia.* 730.]

DEEMER, J. Defendant is a corporation engaged in the manufacture and sale of creamery supplies, fixtures, etc., at the city of Waterloo. It keeps for sale, and sells, sulphuric acid, which is extensively used in all creameries. On or about January 26, 1903, it sold at retail to one Riedel a one-gallon jug of sulphuric acid, but failed to label the same as required by statute, or to indicate in any manner upon the package that it contained a deadly poison. Riedel owned and operated what was known as the "Crane Creek Creamery," in a rural community in Black Hawk County, and he took the jug containing the acid to his said creamery, and placed it upon a shelf in one of the rooms thereof. It was the custom at this creamery to put buttermilk in jugs similar to the one in which the acid was placed, for the use of customers and employees of the creamery, who were invited and permitted to drink the milk placed therein. Harry O. Burk, plaintiff's minor son, who was then seventeen years of age, was lawfully at the creamery on the 9th day of February, 1903, and, seeing the jug containing the acid, asked an employee at the creamery if he could have a drink of buttermilk. The employee, not knowing that the boy had his eye on the sulphuric acid jug, but supposing that he was referring to another close at hand, which did contain buttermilk, told him that he could, and invited him to drink of the milk. Burk went to the jug containing the acid, and, supposing that it contained buttermilk, drank therefrom, and, as a result thereof, died the next day. The acid was taken about two o'clock in the afternoon of a bright day, and the room in which the jug was kept was well lighted. Burk's eyesight was good and he could easily have seen a label had one been placed upon the jug. Creameries universally use sulphuric acid for the purpose of testing milk and cream for butter fat, and this the defendant company well knew. The jug containing the acid was a little larger than the buttermilk jug, but both were one-gallon white jugs, and there was nothing in general appearances to distinguish one from the other. Defendant knew that it was the custom of all creameries to provide buttermilk for people to drink, and that patrons thereof carried the same away for use at their homes.

Code, § 4976, provides, in substance, that if any person deliver to another any poisonous liquor or substance without having the word "poison," and the true name thereof, written or printed upon a label attached to or affixed upon the vial, box, or parcel containing the same, he shall be guilty of a misdemeanor. And §§ 2588 and 2593

also prohibit the sale of poisons, except that the same be labeled as therein required. Violation of such statutes is universally held to be negligent. Ives *v.* Weldon, 114 Iowa, 476, and cases cited.

But defendant contends that this negligence was not the proximate cause of the injury to the plaintiff's son. It was, of course, incumbent upon the plaintiff to show, not only a violation of one or the other of these sections of the Code, but also that such violation was the proximate cause of the injury and death of his son. That matter was submitted to the jury under proper instructions, and it found for the plaintiff on this issue.

But it is said that Riedel, the owner of the creamery, was also guilty of negligence in placing the jug in the creamery at the place he did, that this negligence was the approximate cause of the injury to plaintiff's son, and that the defendant had no reason to apprehend or anticipate any negligence on the part of the purchaser of the acid. As said in the Ives Case, *supra*, these statutes were made for the protection of all persons in the State, and to warn all that the substance they are handling is dangerous, and that its use requires constant care. Defendant, as we have said, knew of the custom which prevailed among creameries, knew that buttermilk is kept there for the use of patrons, and that sulphuric acid is used in all creameries. It knew, or should have known, that anyone lawfully about the creamery was likely to pick up this jug, and to use the same for any legitimate purpose. It owed a duty to anyone who might rightfully handle or use the jug in the ordinary, usual, or customary manner. This jug had to be kept about the creamery, and there was no statutory or other obligation on the part of the creamery owner to keep it under lock and key. Of course, if he knew that it was not labeled, or by the use of ordinary care should have known of that fact, he would be required, on account of the dangerous character of the acid, to use due care to protect all persons who might rightfully come in contact therewith. But failure on the part of the purchaser to do this would not necessarily excuse the vender for his violation of law.

But defendant insists that it had no reason to anticipate the wrongful or negligent acts of the manager of the creamery, and that it is for that reason not liable for the consequences thereof. While there are some loose expressions in the books to the effect that one is not liable for negligence unless the results of his acts might reasonably have been foreseen by him, the true doctrine, as we understand it, is that it is not necessary to a defendant's liability that the consequences of his negligence should have been foreseen. It is sufficient if the injuries are the natural, though not the necessary or inevitable, result of the wrong; such injuries as are likely, under ordinary circumstances, to ensue from the act or omission in question. The test, after all, is, would ordinary prudence have suggested to the person sought to be charged with negligence that his act or omission would probably result in in-

jury to someone? The particular result need not be such as that it should have been foreseen. Palmer *v.* R. R. Co., 124 Iowa, 424; Hazzard *v.* City, 79 Iowa, 106; Doyle *v.* R. R. Co., 77 Iowa, 607; Osborne *v.* Van Dyke, 113 Iowa, 557. In applying this doctrine to cases where there is an intervening agency, it is generally held that the intervening act of an independent voluntary agent does not arrest causation, nor relieve the person doing the first wrong from the consequences thereof, if such intervening act was one which would ordinarily be expected to flow from the act of the first wrongdoer. Lane *v.* Atlantic, 111 Mass. 136.

Where several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes; but it cannot be attributed to a cause unless without its operation the accident would not have happened. These rules have full support in our cases. Walrod *v.* Webster Co., 110 Iowa, 349; Harvey *v.* Clarinda, 111 Iowa, 528; Buehner *v.* Creamery Co., 124 Iowa, 445; Palmer *v.* R. R. Co., 124 Iowa, 424; Gould *v.* Schermer, 101 Iowa, 582; Liming *v.* R. R. Co., 81 Iowa, 246; Schnee *v.* City, 122 Iowa, 459; Ives *v.* Weldon, *supra.*

Referring now to the facts. The jury was fully justified in finding that but for defendant's act or omission the accident in question would not have happened. Under the testimony, the injury to plaintiff's son might well have been found to be the direct and proximate result of defendant's failure to label the jug containing the poison. Had it been labeled, the accident would not have happened, even though the managers of the creamery may have been negligent in placing it where they did. Moreover, had it been properly labeled, the jury might well have concluded that there would have been no negligence on the part of the creamery managers in placing it where they did.

The direction to plaintiff's son to drink out of a jug was not of itself negligence. The person giving the permission did not know that the boy had in mind the jug containing the acid, and there is nothing to show that this person even knew there was a jug there containing acid. It was a question for the jury, under proper instructions, to determine whether or not defendant's negligence was the proximate cause of the accident. See cases hitherto cited. The instructions given by the trial court on that subject were correct, and with the finding of the jury thereunder we are not disposed to interfere.

The defendant might reasonably have foreseen that its act or omission was likely to cause injury to someone who might rightfully handle the jug, and it is not enough for it to say that it could not reasonably have foreseen the exact mishap. None of the cases cited and relied upon by appellant announce a contrary doctrine, although in some of them expressions are used which, in a measure at least, give color to its propositions. With reference to these, and to all other cases

bearing upon the subject, it may be said that no one has as yet given a very satisfactory definition of proximate cause. Indeed, one must of necessity look to practical distinctions on this subject, rather than to merely academic or theoretical ones, and, after all is said, each case must be decided largely on the special facts belonging to it. At most, the act of Riedel was a concurring and coöperating fault, and not in itself the producing cause of the injury.[1]

The principal point in the case is the doctrine of proximate cause as applied to the facts disclosed by the record. We think there was sufficient testimony to take the case to the jury on this proposition.

There is no error in the record, and the judgment is *affirmed.*

BELL v. ROCHEFORD. 190 Ed 2nd 1

SUPREME COURT OF NEBRASKA, 1907.

[*Reported* 78 *Neb.* 310.]

THE defendants were independent contractors engaged in the erection of a power house for the Omaha Street Railway Company, and were, at the time of the accident, putting in a concrete floor in the second story. That portion of the floor at the point where the accident occurred was above a room 9 by 40 feet, with a 10 foot ceiling. To support the concrete steel I beams were placed crosswise of the room at a distance of 8 or 9 feet apart. They rested at either end upon a concrete wall, in which openings were left for that purpose. The steel beams were from 4 to 6 inches wide at the base and top, 10 inches deep, and weighed 150 pounds. The pockets into which the ends were placed were about 10 inches wide. For the purpose of holding the concrete in position until it hardened, wooden forms were built so that they might be removed after the concrete became self-supporting. These forms were constructed by placing a 2-by-12-inch plank lengthwise under each I beam, and were held in place by means of 4-by-4 inch pieces extending from the lower floor to the under side of the plank, leaving a margin of from 3 to 4 inches on either side of the steel. The space between two I beams was called a section. Other planks were then placed crosswise of the section, the ends resting upon the edge of the 2-by-12-inch pieces.

Wooley called to the plaintiff to come and assist him in putting this last plank in place. Wooley was at the west side of the form and the plaintiff at the east. The plank selected was a little wide for the opening, and in order to crowd it into place one edge of this plank and the edge of an adjoining plank were raised, placed together in a V shape, and the plaintiff, in a stooping position, was attempting to

[1] The discussion of other alleged errors is omitted. — ED.

crowd it into place. His weight and the pressure caused the 2-by-12 on the side where he was at work to tip, the steel beam turned over, and the form of that entire section fell with the plaintiff into the basement below, resulting in the injury on account of which damages are claimed.[1]

CALKINS, C. This cause was submitted upon an oral argument of a motion for a rehearing. . . . The amended petition described the construction of the forms, set forth the particular facts which it was claimed made the structure insecure, and alleged that the plaintiff, in obedience to the direction of the defendant's foreman, went upon the structure, and, while engaged in his work thereon, was by the falling of the structure precipitated to the floor below, thereby suffering the injuries complained of. If we understand the contention of the defendant's counsel, it is that, since the petition does not state that the weight of the plaintiff and his efforts to crowd the plank in place caused the collapse of the section, it fails to allege the proximate cause of the accident. The argument of the defendant proceeds upon the theory that placing the weight of the plaintiff upon the structure, and his effort to put the plank in place, was the proximate cause of the accident. It is the same as if, in a case where A, owing a duty to B to construct a bridge in a safe and secure manner, negligently leaves it unsafe and insecure, and B, relying upon its apparently safe condition, or, as in this case, upon the express direction of A, goes upon it and it falls, we should say that the proximate cause of the catastrophe was the weight of B, and not the negligence of A. Such is not the law. The proximate cause is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in time to the injury. Milwaukee & St. P. R. Co. *v.* Kellogg, 94 U. S. 469; Aetna Fire Ins. Co. *v.* Boon, 95 U. S. 117. The inquiry must be, says Mr. Justice Strong, "whether there was any intermediate cause, disconnected with the primary fault and self-operating, which produced the injury." It is clear that the weight of the plaintiff, and his efforts to place the plank, was not such intermediate cause, disconnected from the primary fault and self-operating, and was not, therefore, in the meaning of the term as applied in the law of negligence, the proximate cause of the injury, and it was neither necessary nor proper to plead it as such in the petition.

We are therefore of the opinion that the motion for a rehearing should be overruled, and we so recommend.

JACKSON, C., concurs.

By the court: For the reasons stated in the foregoing opinion, the motion for a rehearing is

Overruled.[2]

[1] This statement of the facts is taken from the report of the original hearing, 78 Neb. 304. — ED.

[2] See also Commonwealth Electric Co. *v.* Rose, 214 Ill. 545, 73 N. E. 780; Knapp

WOODSON v. METROPOLITAN STREET RAILWAY CO.

SUPREME COURT OF MISSOURI, 1909.

[*Reported* 224 *Mo.* 685.]

GRAVES, J.[1] . . . But plaintiff urges that, concede it to be true, as defendants say, and as their evidence strongly tended to prove, that deceased became affected and staggered from the brick walk to the sodded portion thereof and in that condition received an injury which hastened his death, yet plaintiff is entitled to recover. We shall consider this question, first, upon the merits of the contention without reference to the pleadings. We start with the proposition that under the evidence there was a dangerous obstruction upon the sidewalk and the same had been there for such length of time that the law presumes notice upon the part of the city, and for that reason its maintenance there at the date of the accident was negligence upon the part of the city. As to the other defendant, we will discuss that later. Now, under these facts, with a part of the sidewalk negligently obstructed by the city, let us proceed with proper caution to get the case properly stated upon the theory that deceased was overcome by vertigo or some other condition superinduced by disease which was preying upon his vitals. The case made may be thus stated: Deceased was leisurely walking along on that portion of the sidewalk which had been paved, and which was not obstructed. Suddenly he is seized with vertigo or something of that character. In his desperation he staggers towards the little tree and tries to grasp it, but fails and falls upon the obstruction negligently there maintained by defendant city. He strikes his head with such force as to cut through to the skull bone for the length of an inch and a half. The plaintiff's physicians say that the shock from that blow was the cause of his death at that immediate time; that, while subsequently he would inevitably have been overcome by the disease, the symptoms revealed were not such as to indicate this early demise, save and except as the diseased condition was augmented by the shock. Under the evidence, but for the obstruction the fall of deceased would have been upon the soft grass plot. Under these facts is there liability upon the part of the city? The city says not, because it was an injury which was not to be reasonably anticipated as a sequence to its negligent act. Is this true? Under these facts, it cannot be said that deceased was negligent.

v. Sioux City & P. Ry., 65 Iowa, 91, 21 N. W. 198; Buckner v. Stock Yards H. & M. Co., 221 Mo. 700, 120 S. W. 766; Lawrence v. Heidbreder Ice Co., 119 Mo. App. 316, 93 S. W. 897; Ray v. Pecos & N. T. Ry., 40 Tex. Civ. App. 99, 88 S. W. 466. — ED.

[1] An extract from the opinion only is given. — ED.

A man blinded by vertigo, or suffering from some other similar condition, cannot be said to be negligent if he grasps for support a little tree planted by the city in a portion of the sidewalk. The proximate cause of his injury would consist of two acts, one coming from him in a dazed condition, and not negligent, and one coming from the city in permitting an obstruction upon the sidewalk, which act was negligence. It ofttimes occurs that the proximate cause of an injury is of double character. In other words there may be two or more causes uniting to produce the injury. In such case if the act of the plaintiff, which is one of the causes, is not negligent, and the act of the defendant, which is the other of such causes, is negligent, then there can be a recovery by the injured party, or the one to whom the cause of action goes, if death results from the injury. (Musick *v.* Dold Packing Co., 58 Mo. App. 322.) This case was discussed and approved by this court in Huss *v.* Bakery Co., 210 Mo. l. c. 53. It is true that we distinguished the Musick Case from the Huss Case, but we fully recognized the soundness of the law announced in the Musick Case. In distinguishing the cases we used this language: "Here we have a record full of evidence that the plaintiff had neglected one of his duties in permitting the passageway to become slippery. The slippery condition occasioned his fall, and, as a result of the fall, his injury. The case is not on all-fours with Musick *v.* Dold Packing Company, 58 Mo. App. 322, relied upon by the plaintiff. In the Musick Case the fall of plaintiff was occasioned by a slippery floor, and by the fall the plaintiff was thrown into an uncovered vat of hot water and burned. There was no evidence that in that record to the effect that the slippery condition was the result of neglect or failure upon the part of Musick, and therein lies the distinction between that case and the case at bar. In other words, Musick had been guilty of no negligence which contributed to his injury, as a proximate cause thereof, or as one of the proximate causes thereof. Here the jury could readily find that the fall upon the slippery floor, at least one of the proximate causes of the injury, was occasioned by the neglect of the plaintiff, and in that way his own neglect contributed to the injury received and was one of the producing causes thereof. There may be a combination of causes producing an injury. In this case, but for the slippery floor (a condition superinduced by the negligence of the plaintiff), there would have been no fall and consequently no injury. On the other hand, there might have been the fall and no consequent injury had the machinery been guarded. The injury was not therefore entirely dependent upon one cause, but upon a result of the two combined, one of which was the product of plaintiff's neglect of duty and want of due care for his own safety."

In the case at bar, if the plaintiff fell for the reasons urged by defendants, there was no negligence in this act, which was one of the two causes which produced the injury. The other contributing cause is practically the conceded negligence of the city. So that, on the evidence

introduced by defendant, plaintiff was entitled to recover if the result was one which could have reasonably been anticipated to flow from the negligent act. Because deceased was diseased he was not precluded from walking upon the sidewalk. Nor is it a stretch of imagination to say that the city must know that afflicted persons of all kinds walk upon sidewalks.

This court has taken broad grounds as to what cases may be considered as falling within the rule of reasonable anticipation of results from negligence in different cases. In Dean *v.* Railroad, 199 Mo. 386, we have a case where the defendant had negligently overloaded the tender of its engine with coal, and, in speeding along its tracks, a lump thereof was thrown off and struck and injured the plaintiff's knee. We held defendant liable. In so doing we approved a rule of law announced by the Iowa court. In that case, l. c. 411, we said: "The fact that the effect in this case was somewhat unusual cannot defeat a recovery. The fact that but few accidents of this sort are recorded in the books cannot save the situation for defendant; for it is self-evident that the question of injury to a man's knee from a flying chunk of coal depends alone upon the coal and the knee coming in contact. If the knee was not there, the knee would not be injured; if the knee was there, then — it is another story. In this case both the man and his knee were at a proper place, at a place defendant's lessee had reason to anticipate their presence. The rule of law controlling in this particular is thus formulated: 'The liability of a person charged with negligence does not depend upon the question whether, with the exercise of reasonable prudence, he could or ought to have foreseen the very injury complained of; but he may be held liable for anything, which, after the injury is complete, appears to have been a natural and probable consequence of his act or omission.' [Fishburn *v.* Railroad, 127 Iowa, l. c. 492, *et seq.*, and cases cited.]"

The doctrine of this case was cited with approval by the court *in banc* in Zeis *v.* St. Louis Brewing Ass'n, 205 Mo. l. c. 651. Upon this theory we believe there is substance in plaintiff's claim, the cause is one which should be submitted to a jury. But it does not follow from this that it was properly submitted under the pleadings and instructions herein.[1]

[1] The court held that, this theory of the case not having been presented to the jury, there must be a new trial.

See also Ashborn *v.* Waterbury, 70 Conn. 551, 40 Atl. 458; Christianson *v.* Chicago S. P. M. & O. Ry., 67 Minn. 94, 69 N. W. 640; Birsch *v.* Citizens' Electric Co., 36 Mont. 574, 93 Pac. 940. — Ed.

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO. *v.* PARRY.

1597 2nd

SUPREME COURT OF KANSAS, 1903.

[*Reported* 67 *Kan.* 515.]

CUNNINGHAM, J. Robert Parry was a passenger on the Santa Fe Railway going from Purcell, Ind. T., to Denver, Colo. In making this journey he was required to change cars at Newton, Kan. As the train approached Newton, and a mile or two south of it, the conductor observed that Parry was ailing with something that looked to him like a fit. He noticed that Mr. Parry "was straightened out, and his limbs were stiff and jerking. He was frothing at the mouth, and his eyes looked glaring and starry, just like a man that had a fit." When the train arrived at Newton, Mr. Parry seemed to be recovering, but had not entirely regained consciousness, and the conductor was unable to get any response when he tried to converse with him. The conductor called the depot master, who, with the assistance of the porter, removed Mr. Parry from the train, the depot master being informed by the conductor of the condition of the passenger, and requested to take care of him, and see that he was put upon the right train to take him to his destination, which train was to leave in about four hours. After the passenger was removed from the train, he was left in the care of the depot master, the porter going to his other duties. The depot master tried to talk with him, but elicited nothing but groans, mutterings, and unintelligible replies. It seemed, however, to the depot master that he desired to go his own way without any assistance, so that, after helping him on with his coat, he was allowed, after about five or ten minutes, to take his own course, without further attention, the depot master supposing that he had been drinking, and desired to go where he could procure liquor. The next seen of him was about four hours after his removal from the train, at a point about five miles south of Newton, where, having lain down upon the railway tracks, he was run over by a south-bound train and killed. The negligence counted upon by the plaintiff, his widow, as a ground for recovery, was that the company failed to exercise a proper degree of caution and care in looking after Mr. Parry after he was removed from the train in an unconscious and irresponsible condition of mind and body. The jury returned a general verdict in favor of the defendant in error, and also answered special questions submitted to them, among which are the following: "(7) What was his appearance and condition, mentally and physically, on his arrival at Newton? Ans. Recovering from a convulsion, and partially unconscious. (8) Did J. W. Anderson, the depot master, at Newton, of the defendant, take charge of the de-

ceased upon his arrival at Newton? Ans. He did." "(10) Does said Anderson possess the common and ordinary capabilities, judgment, and prudence of men and persons generally? Ans. We think so. (11) About how long did said Anderson keep charge of said deceased? Ans. Five to ten minutes." "(15) When said Anderson ceased to care for the deceased, did Anderson believe that the deceased had sufficient strength and consciousness to take care of himself? Ans. He claimed so. (16) At the time Anderson ceased to care for the deceased, did he think or contemplate that deceased would wander away, and afterwards get into a place of danger and lose his life? Ans. No." The railroad company demurred to the plaintiff's evidence, which was overruled. It also moved for judgment in its favor upon the special findings. This was overruled, and judgment entered for plaintiff upon the general verdict.

The railway company here insists that the judgment against it was erroneous, first, because there was no evidence showing any culpable negligence on the part of any of its agents or servants; second, if there was, that such negligence was not the proximate cause of the injury.[1]

It is further contended that, even though the depot master was negligent in his manner of treatment of the deceased, such negligence was not the proximate cause of the death; that no reasonably prudent man would have foreseen that Parry would have wandered away for a distance of five miles, and have laid down or fallen upon the track in such a place and position that he would be run over by the train, and thus killed; and that the company, therefore, was not required to guard against so improbable a result. Negligence, to be the proximate cause of an injury, must be such that a person of ordinary caution and prudence would have foreseen that an injury would likely result therefrom; not that the specific injury would result, but an injury of some character. "'It is not necessary,' say the Supreme Court of Minnesota, following the Supreme Judicial Court of Massachusetts, 'that the injury, in the precise form in which it in fact resulted, should have been foreseen. It is enough that it now appears to have been a natural and probable consequence.' In other words, it is not necessary to a defendant's liability, after his negligence has been established, to show, in addition thereto, that the consequence of his negligence could have been foreseen by him; it is sufficient that the injuries are the natural, though not the necessary and inevitable, result of the negligent fault." Thompson's Com. Law of Neg., § 59. It here appears that the place where the depot master permitted Parry to go by himself was near a street crossing over which tracks were laid along which trains passed. It was a place of danger to one not in the possession of his faculties; a place where the depot master might reasonably have apprehended that harm of some sort would come to Parry in his then condition.

[1] The court held that there was sufficient evidence to support the verdict upon the first point. — ED.

So that, although he wandered for four hours, and was run over five miles from this place, the act of the depot master in permitting him to go was no less the proximate cause of his death than it would have been if it had occurred within a short distance and a few moments. At most, the question whether the negligence of the depot master was the proximate cause is one upon which the minds of different parties might reasonably disagree, and, such being the case, and the whole matter having been submitted to a jury under proper instructions, and it having found that it was, we may not disregard these findings of fact. We are of the opinion that upon both questions there was sufficient evidence to go to the jury and to sustain the general finding in favor of the defendant in error.

The judgment will be affirmed. All the Justices concurring.

MUNSEY *v.* WEBB.

SUPREME COURT OF THE UNITED STATES, 1913.

[*Reported* 231 *U. S.* 150.]

HOLMES, J. This is an action brought against the owner of a building for causing the death of the plaintiff's intestate in an elevator in which the deceased was being carried to his place of employment. Negligent construction and negligent management of the elevator are alleged. The plaintiff had a verdict against a request by the defendant that one be directed for him, the judgment was affirmed by the Court of Appeals, 37 App. D. C. 185, and the defendant brought the case here.

The elevator car did not quite fill the well, or shaft, and the bottom of the floor that it was approaching projected at right angles into the well about three and one-half inches. The car was equipped with a collapsible door, which was open at the time of the accident, and the boy in charge did not have his arm across the space as he had been instructed to do. Between the fourth and fifth floors the deceased fell and his head was caught between the projecting bottom of the fifth floor and the floor of the car and was crushed. The negligence relied upon is the leaving of the door open and failure to guard the space; the not having a flange or piece of metal inclining from the projecting floor to the shaft wall, and the failure to use an emergency switch, the quickest means of stopping the car, the boy in charge not having been instructed in the use of it.

The plaintiff in error argued at some length that there was no negligence, because the fall of the deceased was something wholly out of the ordinary course and not to be foreseen; or that, if there was negligence in any sense, it was not the proximate cause of the death but

merely a passive condition made harmful by the fall. Neither argument can be maintained. It is true that it was not to be anticipated specifically that a man should drop from internal causes into the open door of the car. But the possibility and the danger that in some way one in the car should get some part of his person outside the car while it was in motion was obvious and was shown to have been anticipated by the door being there. In some circumstances at least it was a danger that ought to be and was guarded against. It is said that the danger was manifest only when the car was crowded, and that the door was needed only for that. If the duty to have the car shut on all sides had been created with reference only to conditions different in kind from those of the accident it may be that the plaintiff could not avail himself of a requirement imposed *alio intuitu*. Eugene F. Moran, 212 U. S. 466, 476. But the accident was similar in kind to those against which the door was provided, and we are not prepared to say, contrary to the finding of the jury, that the duty to keep it shut or to guard the space with the arm did not exist in favor of all travelers in an elevator having the structure that we have described. It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye. Washington & Georgetown R. R. Co. *v.* Hickey, 166 U. S. 521, 526, 527.

If there was negligence it very properly could be found to have been the proximate cause of the death. See Milwaukee & St. Paul Ry. Co. *v.* Kellogg, 94 U. S. 469. Even if it were true that the neglect was merely a passive omission, the deceased was invited into the elevator and the principle of the trap cases would apply. Corby *v.* Hill, 4 C. B. (N. S.) 556, 563. Sweeney *v.* Old Colony & Newport R. R. Co., 10 Allen, 368, 374. But that is not the case. The defendant is sued for having crushed the head of the deceased by forces that he put in motion. He replies that it would not have happened but for the unforeseen fall of the deceased without the defendant's fault, and to this the plaintiff rejoins and the jury has found that the defendant was bound to take the easy precaution which he had provided against any and all ways by which a passenger's body could get outside the car while it was going up. Hayes *v.* Michigan Central R. R. Co., 111 U. S. 228, 241. Choctaw, Oklahoma & Gulf R. R. Co. *v.* Holloway, 191 U. S. 334, 339. The whole question comes down to whether we are prepared to say as matter of law against the finding of the jury that, in an elevator constructed as this was with a special source of danger in the shaft outside the car, to require the defendant to guard the door space *in transitu*, at his peril, is too strict a rule. We cannot go so far. McDonald *v.* Toledo Consol. S. Ry. Co., 74 Fed. Rep. 104, 109.

There was perhaps evidence sufficient to warrant a finding that there was negligence in not stopping the car after the fall and before the harm was done, and a finding on that ground would not open the

questions that have been discussed; but we have preferred to deal with the case on the matters principally argued, as they seem to offer the most obvious reasons for the verdict, and therefore have assumed that the jury found the facts and standard of conduct to be as we have supposed.

Judgment affirmed.

ROLLINS *v.* CENTRAL MAINE POWER CO.

SUPREME JUDICIAL COURT OF MAINE, 1913.

[*Reported* 88 *Atl. Rep.* 86.]

SAVAGE, C. J. Exceptions to the overruling of the defendant's demurrer. In the declaration it is alleged in substance, among other things, that the plaintiff on the day of the injury complained of was a conductor on one of the cars of an electric railway; that Depot Square in Gardiner was the terminal point of his car; that the defendant company had previously located and was then maintaining an electric arc lamp less than fourteen feet from the ground, and so placed, with reference to the stopping place of the plaintiff's car, that in turning the trolley pole to prepare for the return trip there was great danger of the pole's breaking the glass globe around the lamp; and that in so placing the light the defendant was negligent. It is further alleged that the plaintiff, on the day in question, in the course of his duty was attempting "to turn the trolley pole on the car from one end to the opposite end, and, while so doing, and while in the exercise of ordinary care, the trolley pole suddenly, with great force and violence, came in contact with the glass globe of the arc light negligently located as aforesaid, breaking the globe so that a portion of it falling struck him in the eye, and entirely destroyed the sight of it."

The point taken under the demurrer is that, even if the defendant was negligent, the declaration shows on its face that its negligence was not the proximate cause of the plaintiff's injury. It is contended that the plaintiff's own act by which the trolley pole struck the globe with "great violence" was the true proximate cause. We do not think the point is well taken.

Of course, if the plaintiff negligently handled the trolley pole so as to cause or allow it to strike the globe, he cannot recover in this suit. But that is a question which cannot be settled on demurrer. The plaintiff alleges that he was in the exercise of due care. And the fact that the trolley pole struck the globe with great violence may have been due to the plaintiff's negligence, and it may not have been. That can be determined only upon a trial on the merits.

Upon the allegations, we think that the turning of the pole by the plaintiff should be called the occasion, and not the proximate cause, of

his injury. Pollard v. Maine Central R. R. Co., 87 Me. 51, 32 Atl. 735. It is no more an intervening cause than is the walking of a man who steps into an unguarded hole in a sidewalk, or the act of a workman in his work who comes in contact with a buzz saw. Suppose the lamp had been hung so low that a motorman driving his car, or a traveler driving in the street, had hit it. Can it be said that the driving in either case was the intervening, efficient cause? By no means. Here nothing intervened. The turning of the trolley pole furnished the occasion for the true proximate cause, the alleged position of the lamp, to become operative.

The two cases cited by the defendant, Nelson v. Narragansett Electric Lighting Co., 26 R. I. 258, 58 Atl. 802, 67 L. R. A. 116, 106 Am. St. Rep. 711, and Leeds v. N. Y. Telephone Co., 178 N. Y. 118, 70 N. E. 219, are not in point. In each of the cases the intervening cause, which was held to be the proximate cause of the injury, was the wrongful, negligent act of a third party. See, also, Currier v. McKee, 99 Me. 367, 59 Atl. 442, 3 Ann. Cas. 57.

Exceptions overruled.[1]

SCHOULTZ v. ECKHARDT MANUFACTURING CO.

SUPREME COURT OF LOUISIANA, 1904.

[*Reported* 112 *La.* 568.]

PROVOSTY, J. Plaintiff was an experienced workman, of 15 years' standing. He was molder and planer foreman, and in that capacity had charge of the workmen, machinery, etc., on one of the floors of defendant's sash and door factory. He states that his further duty was "to fix belts and keep the machines in running order." He had been in defendant's employ some 14 months, discharging those duties, when he was called upon to mend one of the belts of one of the saw tables, and had four of his fingers cut off in attempting to do the work. As soon as his hand got well, he went back to his same work in defendant's mill, at the same wages, and worked for some time, until he quit of his own accord. During this time he acknowledged that he himself was to blame for the accident. He denies that he made such admission, but three witnesses testify to it. Afterwards he changed his mind and brought this suit, 11 months after the accident.

The saw table in question is 5 feet long, 3 feet wide, and 3 feet 6 inches high. It is a substantial structure, the framework underneath consisting of three thick uprights on each side, braced at top and bottom by thick crosspieces, both on the sides and on the ends. The

[1] See Cleveland C. C. & S. L. Ry. v. Patterson, 37 Ind. App. 617, 75 N. E. 857.—ED.

saw — a circular saw, 14 inches in diameter — is under the table, the blade protruding through a longitudinal slit in the middle of the table. The belt to be mended is under the table, to one side, and near one of the ends. It could be reached for mending, without any danger from the saw, from that side of the table on which it was, and from either end of the table. Plaintiff chose the other side of the table, from which he could not reach the belt without stretching his arms across the line of the saw. He got down on his knees, and put his head and arms into the framework of the table. The saw was then above him, to his right. What he did while in this position, and what happened, we will let him describe himself: "I got hold of the belt and commenced to lace it, and I was pulling on it, when the lacing string got caught in some way, and I could not pull it very easily. So I took a good hold of it, and I wrapped it round my hand or fingers as a man usually does when he wants to pull hard, and I pulled with all my might with my hand, holding it down with the other; and when I pulled so hard the lacing string broke, and it broke with such force that my hand flew up and struck against the saw, that was running, and it took my fingers off."

The negligence charged against defendant is alleged to have consisted in:

(1) That the saw was running at an excessive rate of speed.

(2) That it was not properly hooded or guarded.

(3) That the machine was not geared with a countershaft, so that it could be stopped without stopping the entire machinery of the mill.

(4) That the place was not sufficiently lighted.

(5) That rubbish had been suffered to accumulate near the table, whereby access to the belt was cut off from the safe side of the table, and plaintiff was put under the necessity of doing the work from the dangerous side.

Plaintiff's argument on the first ground is that, if the speed of the machine had been less, the belt might have held out until a time when there might have been no rubbish to prevent his doing the work from the safe side, and that in that event he would have escaped injury. Here, in truth, is a string of conjectures. But assuming them all to be established facts, the simple legal answer is that, after the belt had given way, and thereby lost its connection with the machine, the speed of the machine ceased to be an element in the problem, and that therefore, as a cause of the injury, the breaking of the belt stands in the same relation to what followed as does any other antecedent, conditional fact — as the fact, for instance, that plaintiff was born. Had the belt not broken at the time it did, there would have been at that time no belt to mend, and no injury; and so, had plaintiff never been born, there would have been no plaintiff, and no injury. One group of causes in the chain of causation culminated in the breaking of the belt. Another group was set in motion by the attempt to mend the

belt. Juridically the two groups are entirely disconnected, and the law looks only to the latter — in other words, to the immediate or proximate cause. Schwartz v. Railroad Co., 110 La. 534, 34 South. 667.

The second ground is equally without merit. The evidence shows — and besides the fact is of itself patent — that the framework of the table is a sufficient guard to the portion of the saw under the table, which is the part that did the injury. It would be exacting too much of an employer to require him to protect such inner and inaccessible parts of machinery, with which no one can come in contact except by such imprudent conduct as that of plaintiff in this case.

As to the third ground, nothing shows that it is negligence not to gear machines like the one in question with a countershaft. The testimony would go to show that machines which run continually are not usually so geared, and that the machine in question ran continually. Furthermore, the testimony shows that this machine is provided with an idler, by means of which it can be disconnected from the rest of the machinery of the mill just as effectually as by means of a countershaft. Beyond this, it appears that plaintiff had the right to stop the machinery of the mill, if necessary to avoid danger in the work of repair. If, therefore, he incurred any extra risk, he did so voluntarily. If there is a safe and an unsafe way of doing a thing, and the servant knows it, or ought to know it, and chooses the unsafe, and is injured, he cannot recover against the master for the injury. Jenkins v. Maginnis Mills, 51 La. Ann. 1011, 25 South. 643.

The complaint as to the want of sufficient light has not reference to sufficient light for the regular operation of the mill, but to sufficient light for doing with safety the work of mending the belt. Such being the nature of the complaint, the answer to it is obvious. The master is not bound to keep his premises so lighted that any and all repair work may be done without the necessity of procuring extra light. When plaintiff undertook to do this repair work, it was for him to know whether he had enough light to do it in, and to procure additional light if needed. He was not a green hand, uninformed of the nature of the work he was called upon to do, but he was the person on his floor supposedly best informed in that regard. To him belonged the duty, in his own words, "to fix belts and keep the machines in running shape."

If the rubbish was in plaintiff's way for repairing the machine with safety, he should have asked that it be removed, or should himself have had it removed. He had ample authority for the purpose. In fact, it was his duty to see to the removal of this rubbish if it stood in anybody's way.

The judgment appealed from is set aside, and the suit of plaintiff is dismissed, with costs in both courts.[1]

[1] See Evansville H. & S. Co. v. Bailey, (Ind. App.) 84 N. E. 549. — Ed.

REGINA *v.* PITTS.

DEVONSHIRE ASSIZES. 1842.

[*Reported* 1 *C. & M.* 284.]

MURDER. The indictment charged the prisoner in one count with having caused the death of the deceased by beating and wounding; in another by drowning: in other counts, the death was alleged to have been occasioned by the deceased in slipping and falling into the water, in endeavouring to escape from an assault made with intent to commit murder, and from an assault made with intent to commit robbery.

The body of the deceased was found in the river at Exeter, and it bore marks of violence, but not of violence sufficient to occasion the death, which appeared from the symptoms to have been produced by drowning. There were marks of a struggle on the ground, and the stick and gloves of the deceased were discovered at no great distance on the banks of the river, but in a place from which it was impossible that the body could have floated to the spot where it was found. The deceased had been drinking with the prisoner and another person on the previous evening, and had been seen, at a late hour, followed by both in a suspicious manner towards his own house. When the prisoner was apprehended, the deceased's watch was found upon him, and there were marks of blood on his coat. The other person implicated in the transaction was admitted queen's evidence, and deposed to the fact, that they two had inveigled the deceased to the water's edge; that the prisoner endeavoured to rob him; that a scuffle took place, and that the prisoner afterwards told him that he had pushed the deceased into the water.

ERSKINE, J. (in summing up). — A man may throw himself into a river under such circumstances as render it not a voluntary act; by reason of force, applied either to the body or the mind. It becomes then the guilty act of him who compelled the deceased to take the step. But the apprehension must be of immediate violence, and well grounded, from the circumstances by which the deceased was surrounded; not that you must be satisfied that there was *no* other way of escape, but that it was such a step as a reasonable man might take. Here, all the circumstances show that, even if the deceased did throw himself into the river, it must have been from circumstances arising out of a scuffle with the prisoner or some other person, or from apprehension of further violence.

The prisoner was acquitted, but pleaded guilty to an indictment for the robbery of the watch.

JONES v. BOYCE.

ASSIZES, 1816.

[*Reported* 1 *Stark.* 493.]

THIS was an action on the case against the defendant, a coach proprietor, for so negligently conducting the coach, that the plaintiff, an outside passenger, was obliged to jump off the coach, in consequence of which his leg was broken.

It appeared that soon after the coach had set off from an inn, the coupling rein broke, and, one of the leaders being ungovernable, whilst the coach was on a descent, the coachman drew the coach to one side of the road, where it came in contact with some piles, one of which it broke, and afterwards the wheel was stopped by a post. Evidence was adduced to shew that the coupling rein was defective, and that the breaking of the rein had rendered it necessary for the coachman to drive to the side of the road in order to stop the career of the horses. Some of the witnesses stated that the wheel was forced against the post with great violence; and one of the witnesses stated, that at that time the plaintiff, who had before been seated on the back part of the coach, was jerked forwards in consequence of the concussion, and that one of the wheels was elevated to the height of eighteen or twenty inches; but whether the plaintiff jumped off, or was jerked off, he could not say. A witness also said, I should have jumped down had I been in his (the plaintiff's) place, as the best means of avoiding the danger. The coach was not overturned, but the plaintiff was immediately afterwards seen lying on the road with his leg broken, the bone having been protruded through the boot.

Upon this evidence, Lord ELLENBOROUGH was of opinion, that there was a case to go to the jury, and a considerable mass of evidence was then adduced, tending to shew that there was no necessity for the plaintiff to jump off.

Lord ELLENBOROUGH, in his address to the jury, said: This case presents two questions for your consideration; first, whether the proprietor of the coach was guilty of any default in omitting to provide the safe and proper means of conveyance, and if you should be of that opinion, the second question for your consideration will be, whether that default was conducive to the injury which the plaintiff has sustained; for if it was not so far conducive as to create such a reasonable degree of alarm and apprehension in the mind of the plaintiff, as rendered it necessary for him to jump down from the coach in order to avoid immediate danger, the action is not maintainable. To enable the plaintiff to sustain the action, it is not necessary that he should have been thrown off the coach; it is sufficient if he was placed

by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril; if that position was occasioned by the default of the defendant, the action may be supported. On the other hand, if the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover. The question is whether he was placed in such a situation as to render what he did a prudent precaution, for the purpose of self-preservation.— His Lordship, after recapitulating the facts, and commenting upon them, and particularly on the circumstance of the rein being defective, added: — If the defect in the rein was not the constituent cause of the injury, the plaintiff will not be entitled to your verdict. Therefore it is for your consideration, whether the plaintiff's act was the measure of an unreasonably alarmed mind, or such as a reasonable and prudent mind would have adopted. If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences; if, therefore, you should be of opinion, that the reins were defective, did this circumstance create a necessity for what he did, and did he use proper caution and prudence in extricating himself from the apparently impending peril. If you are of that opinion, then, since the original fault was in the proprietor, he is liable to the plaintiff for the injury which his misconduct has occasioned. This is the first case of the kind which I recollect to have occurred. A coach proprietor certainly is not to be responsible for the rashness and imprudence of a passenger; it must appear that there existed a reasonable cause for alarm.

The jury found a verdict for the plaintiff.— Damages 300*l.*[1]

REGINA *v.* MARTIN.

COURT FOR CROWN CASES RESERVED. 1881.

[*Reported* 8 *Q. B. D.* 54.]

AT the general quarter sessions for the borough of Leeds, held on the 4th of July, 1881, Edwin Martin was tried upon an indictment charging that he did unlawfully and maliciously inflict grievous bodily harm upon George Pybus against the form of the statute, etc., and, by a second count, that he did unlawfully and maliciously inflict grievous bodily harm upon Martin Dacey against the form of the statute, etc.

The indictment was framed on the 20th section of 24 & 25 Vict. c. 100.

The evidence for the prosecution was to the following effect: —

[1] See also Yongue *v.* St. Louis & S. F. R. R., 133 Mo. App. 141, 112 S. W. 985; St. Joseph & G. I. R. R. *v.* Hedge, 44 Neb. 448, 62 N. W. 887; Quigley *v.* Delaware & H. C. Co., 142 Pa. 388, 21 Atl. 827. — ED.

The gallery in the Theatre Royal at Leeds is reached from the street by a stone staircase, which is lighted by three gaslights, of which one is at the top, one on a landing about the middle, and the third over the door of the pay office, which is at the bottom of the stairs. These lights are all fastened to the walls at the height of seven feet or thereabouts above the stairs or landings. Between the street and the bottom of the staircase there are a pair of folding-doors opening outwards into the street. Each of these doors is divided into halves, of which the halves nearest to the door-posts or walls on each side can be kept closed by means of strong iron bars let into sockets in the stonework of the staircase, and connected with the doors by iron bolts. These bars are moveable. The practice was to open only the central halves of the doors whilst the audience were assembling and passing the pay office, so as to limit the number of those who could pass in at the same time, and to remove the iron bars and open the whole of the doors some time before the conclusion of the performance, so as to allow the audience to pass out into the street more quickly.

It was proved that on the night of the 30th of April, 1881, shortly before the conclusion of the performance, the folding-doors were opened to their full extent, and the iron bars placed against the wall of the staircase to the right hand of a person leaving the theatre, and close to the door, according to the usual practice.

The evidence shewed that the gallery on this night was filled to the extent of about three-fourths of its total capacity.

The defendant (who was well acquainted with the theatre, having assisted on several occasions as a supernumerary) was proved to have been in the gallery on this night, and to have been the first, or almost the first, to leave it, at the conclusion of the performance. It was proved that he ran quickly down the gallery staircase, and that as he did so he reached up with his hand and put out the gaslight on the middle landing, and also that over the pay office.

It was also proved that as he passed out into the street he took one of the iron bars which was leaning against the wall close to the door on his right hand side, and threw it or placed it partly across the doorway. Almost immediately after this had been done by the defendant the whole of the folding-doors became closed. The evidence as to how this occurred was extremely vague. The result however of the doors being closed and the lower lights extinguished was to leave the lower part of the gallery stairs in almost entire darkness.

Almost immediately after the lights were put out, a panic seized the audience, who rushed down stairs and endeavoured to find their way into the street. In consequence of the presence of the iron bar, which the defendant had placed or thrown across one part of the doorway, and of the doors being shut, it was some time before any of them could reach the street, and in the meantime the pressure from behind forced those in front against and under the iron bar and against the doors, and a large number of persons were very seriously injured and had to be

removed to the infirmary. Amongst those injured were George Pybus and Martin Dacey. The medical evidence was to the effect that George Pybus shewed signs of fracture of the base of the skull, which was probably caused by his slipping and falling backwards as he was running down the stairs after the gaslights had been extinguished, and so striking his head upon the stairs, and that Martin Dacey was suffering from collapse, the result of partial suffocation arising from the pressure to which he had been subjected in the crowd on or at the foot of the stairs.

It was clearly proved that the defendant was on the stage of the theatre after the accident assisting the injured persons who had been brought there. There was no evidence of any previous quarrel or dispute between him and the managers or officials of the theatre, or between him and any person in the gallery.

The defence set up for the defendant was an alibi.

In summing up the evidence to the jury the learned Recorder directed them that malice was an essential ingredient in the offence charged against the defendant, and intimated to them that if they were of opinion that the conduct of the defendant in extinguishing the lights and throwing the iron bar across the doorway amounted to nothing more than a mere piece of foolish mischief they might acquit him; but that if they believed the acts were done with a deliberate and malicious intention they ought to convict.

The following questions were left to the jury:

1. Did the prisoner extinguish the gaslights, or either of them?
2. Did he place or throw the bar across the doorway in such a manner as to make the means of exit more difficult?
3. If he did extinguish the lights or either of them, did he do so with the intention of causing terror and alarm in the minds of the persons leaving the gallery?
4. If he did throw or place the bar across the doorway, did he do so with the intention of wilfully obstructing the means of exit from the gallery?
5. Were Pybus or Dacey, or either of them, injured by reason of any of the acts of the prisoner? and if so by which of them?

The jury found the defendant guilty, answered the first four questions in the affirmative, and stated that they found that both Pybus and Dacey were injured by reason of each of the acts of the defendant mentioned in the first and second questions.

The question for the consideration of the Court was, whether the defendant was properly convicted on the above facts and finding of the jury.

No counsel appeared.

LORD COLERIDGE, C. J. I am unable to entertain any doubt as to the propriety of this conviction. The prisoner was indicted under 24 & 25 Vict. c. 100, s. 20, which enacts that "whosoever shall unlawfully

and maliciously wound, or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, etc."

The learned judge after stating the facts, continued: Upon these facts the prisoner was convicted, and the jury found all that was necessary to sustain the conviction. The prisoner must be taken to have intended the natural consequences of that which he did. He acted "unlawfully and maliciously," not that he had any personal malice against the particular individuals injured, but in the sense of doing an unlawful act calculated to injure, and by which others were in fact injured. Just as in the case of a man who unlawfully fires a gun among a crowd, it is murder if one of the crowd is thereby killed. The prisoner was most properly convicted.

FIELD and HAWKINS, JJ., concurred.

STEPHEN, J. I am entirely of the same opinion, but I wish to add that the Recorder seems to have put the case too favourably for the prisoner, for he put it to the jury to consider whether the prisoner did the act "as a mere piece of foolish mischief." Now, it seems to me, that if the prisoner did that which he did as a mere piece of foolish mischief unlawfully and without excuse, he did it "wilfully," that is "maliciously," within the meaning of the statute. I think it important to notice this as the word "malicious" is capable of being misunderstood. Lord Blackburn (then Mr. Justice Blackburn) in the cases of Reg. *v.* Ward, Law Rep. 1 C. C. R. 356, 360, and Reg. *v.* Pembliton, Law Rep. 2 C. C. R. 119, 122, lays it down that a man acts "maliciously" when he wilfully and without lawful excuse does that which he knows will injure another.

CAVE, J., concurred. *Conviction affirmed.*

TUTTLE *v.* ATLANTIC CITY RAILROAD CO.

COURT OF ERRORS & APPEALS OF NEW JERSEY, 1901.

[*Reported* 66 *N. J. L.* 327.]

VROOM, J. The writ of error in this cause brings up the record of a suit brought in the Supreme Court and tried at the Camden Circuit Court. The defendant, the Atlantic City Railroad Company, maintained a freight yard on the south side of Mechanic Street, in the city of Camden, and on the 25th day of September, 1899, while a flying drill was being made, one of the cars was derailed and dashed across Mechanic Street, over two curbstones and two trolley tracks, and broke through the front of the house opposite, No. 293, belonging to a Mrs. Brennan. At the time of the accident, Mrs. Tuttle, one of

the plaintiffs, was on the sidewalk near the Brennan house, and looking she saw the car coming across the street at full speed; becoming frightened at the noise, she started to run, and when three or four doors below fell and injured her left knee.

At the close of the plaintiff's case a motion for a non-suit was made on the part of the defendant, upon the ground that, if any negligent conduct had been proved on the part of the defendant by reason of this car having gotten away from where it belonged, the plaintiff was guilty of contributory negligence in going away from a place of safety to a place of insecurity; that she was at a safe distance from the car, and there was no occasion for her to remove from it. The testimony, however, of the plaintiff was that she was in front of Mrs. Brennan's door, or had just passed it, when she saw the car coming over, and it was further disclosed by the testimony that this car, in coming across the street, was not running on any track. Is it reasonable even to suppose that the plaintiff could have had any means of knowing the direction the car would take; she was rightfully on the street, and the unusual sight of a car crashing across the street at full speed precluded any possibility of reflection as to the best thing to do. Acting under the impulse of fear, she ran, and just as the car crashed into the Brennan house she fell.

The motion to non-suit was denied, and the trial resulted in a verdict for the plaintiffs.

The real question in issue in the case and to be determined by the jury was whether the plaintiff (Mrs. Tuttle), seeing the car approaching at great speed across this street, was justified in running to escape from what she supposed was an imminent danger.

In the case of Stokes *v.* Saltonstall, 13 Pet. 181, which was an action brought to recover damages sustained by the wife of the plaintiff by the upsetting of a stage coach in which she was a passenger, the question was whether the stage was upset by the negligence of the driver or by the act of the plaintiff and his wife in rashly and improperly springing from it. The court held that "if the want of proper skill or care of the driver placed the passengers in a state of peril, and they had at that time a reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing his horses, the plaintiff was entitled to recover; although the jury may believe, from the position in which the stage was placed from the negligence of the driver, the attempt of the plaintiff and his wife to escape may have increased the peril or even caused the stage to upset, and although they also find that the plaintiff and his wife would probably have sustained little or no injury if they had remained in the stage."

And in the case of Jones *v.* Boyce, 1 Stark. 402, which was an action against a coach proprietor for so negligently conducting the coach that the plaintiff, an outside passenger, was obliged to jump off the coach, in consequence of which his leg was broken, Lord Ellenborough held:

"To enable the plaintiff to sustain the action it is not necessary that he should have been thrown off the coach; it is sufficient if he was placed, by the misconduct of the defendant, in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at a certain peril. On the other hand, if the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury he sustained is to be attributed to rashness and imprudence, he is not entitled to recover."

The doctrine is concisely stated in 1 Shearm. & R. Negl. *89: "If one is placed, by the negligence of another, in such a position that he is compelled to choose instantly, in the face of grave and apparent peril, between two hazards, and he makes such a choice as a person of ordinary prudence placed in such a position might make, the fact that if he had chosen the other hazard, he would have escaped injury, is of no importance."

The contention of the defendant was that the plaintiff was in a safe place, and that while it was true that the sight of a car coming as this one did was unusual, still that there was nothing attendant upon it which should lead one, in a safe position, precipitately to leave it. The counsel for the defendant at the trial requested the judge to charge that if the jury believe that Mrs. Tuttle was at a safe location before the injury complained of, and was afterwards injured by removing from such safe place, she cannot recover, but this matter was correctly disposed of in the charge that "safe place is a term which is not easy to define. To charge that in this case she was 'in a safe place,' would be to charge that the circumstances which brought about this fright and terror under which she seems to have acted were not sufficient to warrant her in removing from that spot and seeking another which, in her judgment, and perhaps a mistaken judgment, she might have deemed safer. There is hardly enough evidence in this case to know whether it was exactly safe where she stood. It turned out afterwards to have been a safe place; but who could tell beforehand how many splinters from this car would fly in all directions, how many cobblestones or other things would fly around? You do not know when you see a car coming just what the end will be, and would naturally seek, possibly, a safer place than you think you occupy, although, after it is all over, you may find that where you stood was a safe place."

This is not a case involving the question whether an action can be sustained for mental anguish or injury unaccompanied by injury to the person; that this would not afford a ground of action is well settled.

In Canning *v.* Williamstown, 1 Cush. 451, it was held that there could be no recovery for risk and peril which caused fright and mental suffering, but those elements could be considered when there was bodily injury, however slight.

And in Victorian Railway Commissioners *v.* Coultas, 13 L. R. App. Cas. 222, where, by a negligent act of the defendant, a collision with a

railway train at a local crossing became imminent, but actual collision was avoided. Nervous shock or mental injury, caused by fright at the occurrence, was held to be too remote a consequence of the defendant's act to be a ground of damage.

Mr. Justice Gummere, in Ward *v.* West Jersey and Seashore Railroad Co., 36 Vroom, 383, clearly states the rule when he says: "It seems to be universally conceded that mere fright, from which no physical suffering results, affords no ground for action," and he subsequently holds that "where personal injury as well as fright is produced by the wrongful act, the rule is entirely settled that the jury is entitled, in fixing the damages, to consider the mental agitation as well as the physical injury."

This harmonizes with the decision in Consolidated Traction Co. *v.* Lambertson, 30 Vroom, 297, and Buchanan *v.* West Jersey Railroad Co., 23 Id. 265.

It is not perceived that the question of recovery for peril, causing mere fright unaccompanied by physical suffering, is, in the remotest sense, presented in this case. The injury sustained by the plaintiff, and for which recovery is sought, was not the result of fright, but was due to the falling down of the plaintiff and the injury to her knee. She was placed in peril by the negligent act of the defendant, and in her effort to escape from danger she fell and was injured. Does it require any stretch of imagination to believe that everyone in the neighborhood of this derailed car was frightened, and it would be extraordinary, indeed, if they attempted to escape and were injured that they should be without remedy.

I think the point decided in Buchanan *v.* West Jersey Railroad Co. governs this case. There a woman was lawfully on the railroad platform of the defendant. A piece of timber projected from one of the cars of a train so as to reach the platform, and in order to avoid being struck she was obliged to throw herself upon the platform. By reaons of the shock to her nervous system her health was seriously impaired.

A verdict in her favor was sustained by the Supreme Court, Chief Justice Beasley saying: "The suit was not on the single ground that the plaintiff had been frightened. There was a basis for the action in the carelessness of the company which compelled the plaintiff to throw herself upon the platform, as such carelessness leading to that result was, *per se*, actionable. The fright was an incident to such cause of action, and a mere aggravation of the tort." See, also, Vandenburgh *v.* Truax, 4 Denio, 464.

In the case under consideration the negligence of the defendant, in permitting the derailing and escape of the car, is too plain for argument, and it was such negligence as caused the plaintiff, in terror, to attempt to escape the peril by running, and in so doing she fell and was injured.

The true rule governing cases of this character may be stated as

follows: That if a defendant, by negligence, puts the plaintiff under a reasonable apprehension of personal physical injury, and plaintiff, in a reasonable effort to escape, sustains physical injury, a right of action arises to recover for the physical injury and the mental disorder naturally incident to its occurrence.

The case below was properly submitted to the jury, and the judgment below should be affirmed.

For affirmance — The Chief Justice, Van Syckel, Dixon, Garrison, Gummere, Collins, Fort, Garretson, Hendrickson, Bogert, Krueger, Adams, Voorhees, Vroom. 14.

For reversal.— None.[1]

BENNETT v. LOCKWOOD.

SUPREME COURT OF NEW YORK, 1838.

[*Reported* 20 *Wend.* 223.]

NELSON, C. J. The defendant took the horse and wagon of the plaintiffs wrongfully and used them, by reason of which taking the plaintiffs were induced to believe that the person to whom they had hired it temporarily had absconded, and therefore they went in pursuit of their property, and expended time and money. It is insisted for the plaintiff in error that the common pleas erred in allowing the plaintiffs to recover for the time spent and expenses incurred, on the ground that the damages thus claimed were not the natural or necessary consequence of the wrongful taking. Admitting the counsel for the plaintiff to be right in this proposition, it is no objection to the recovery if the damages were proximate and not too remote, and were claimed in the declaration. 1 Chitty's R. 333. 1 Saund. Pl. and Ev. 136. Here the damages were duly claimed; they occurred in the use of reasonable means on the part of the plaintiffs to re-possess themselves of their property, and were occasioned by the wrongful act of the defendant.

Judgment affirmed

PAGE v. BUCKSPORT.

SUPREME JUDICIAL COURT OF MAINE, 1874.

[*Reported* 64 *Me.* 51.]

PETERS, J. The plaintiff was driving with a horse and gig over a defective bridge in the defendant town when the horse broke through

[1] See Vallo v. United States Exp. Co., 147 Pa. 404, 23 Atl. 594. — ED.

the bridge and fell. The plaintiff immediately jumped from his gig and undertook to extricate the horse from the hole in the bridge. In doing so, in the struggle of the horse to free himself, he was struck by the horse's head and personally injured thereby. He was at the time of the injury in the use of common care.

The question is, whether the defect in the way can be considered as the direct and proximate cause of the injury complained of. The defendants contend that it was not. Their counsel attempt to fortify this position by many plausible and interesting illustrations. There may be a good deal of subtlety and refinement of argument upon questions of this kind. There can be no fixed and immutable rule upon the subject that can be applied to all cases. Much must therefore, as is often said, depend upon the circumstances of each particular case.

Upon the facts of this case, we think that the defect in the way was the proximate cause of the injury, and that the defendants are liable for the damages sustained. The foundation of this liability, is the services rendered or attempted to be rendered by the plaintiff for the benefit of the town, when the injury was received. The law required such services of the plaintiff. It was his duty to save the horse if possible. He would have been guilty of negligence towards the town if he had failed to make all reasonable attempts to do so. It is a general rule of law, that, where a person may sustain an injury by the fault of another, common care should be used upon his part to render the injury for which the party in fault is responsible as light as possible. He may be compensated for an injury received when in the exercise of such care and prudence, although a mistake may be made. In Lund *v.* Tyngsboro, 11 Cush. 563, it was held that a town was liable to a traveler who, in the exercise of common care and prudence, leaps from his carriage because of its near approach to a dangerous defect in the highway and thereby sustains an injury, although he would have sustained no injury if he had remained in the carriage. The same principle was established in Ingalls *v.* Bills, 9 Metc. 1; and the same doctrine was applied to the facts in the case of Stover *v.* Bluehill, 51 Maine, 439. The defendants however seek to distinguish those cases from this. They admit that such a doctrine would be applicable if the injury had happened here to the horse instead of to the driver. But we do not perceive that there would be any difference upon principle, whether the injury was to the plaintiff's person or his property. The accident to the horse was an injury sustained by the owner of the horse. The plaintiff was attempting to relieve himself of an injury to his horse, and thereby of an injury to himself, when the horse in his struggles struck him with his head. This view of the facts is supported by the case of Stickney *v.* Town of Maidstone, 30 Vt. 738, cited upon the plaintiff's brief, which is as near a copy of the facts in this case as two cases could well be alike. We think that

all which took place at the time of the accident was, as between these parties, but a single happening or event. It was but one accident.

Exceptions overruled.

APPLETON, C. J., CUTTING, WALTON, BARROWS, and DANFORTH, JJ., concurred.[1]

ILLINOIS CENTRAL RAILROAD CO. v. SILER.

SUPREME COURT OF ILLINOIS, 1907.

[*Reported* 229 *Ill.* 390.]

DUNN, J. delivered the opinion of the court:

Appellant presents two propositions only: First, the declaration does not state a cause of action; second, there is no proof that appellant set out the fire or that the deceased used due care.

The declaration consisted of five counts, the second and fifth of which were substantially alike, and alleged that defendant negligently suffered large quantities of combustible material to accumulate upon its right of way; that fire from one of defendant's engines ignited said combustible material and thence spread and was communicated to the decedent's premises, and while decedent, with all due care and caution for her own personal safety, was endeavoring to suppress said fire and protect her dwelling house on said premises, whose destruction was threatened, her clothing was ignited by said fire, in consequence whereof she was burned and died. The third and fourth counts allege that fire escaped from one of defendant's locomotives by defendant's mere neglect and set fire to certain combustible material on its right of way and decedent's adjoining close, and while decedent, with all due care for her personal safety, was endeavoring to extinguish the fire and protect her dwelling house, which was threatened with destruction, her clothing was ignited and she was burned, and in consequence thereof died.

It is claimed that the second and fifth counts are statutory and therefore bad, because the statute in reference to the accumulation of dangerous combustible material upon the right of way of a railroad company (3 Starr & Cur. Stat. par. 69, p. 3263) refers back to the preceding section for its penalty, and applies only to stock and not to persons. But these counts do not refer to the statute and do not depend upon it for their validity. Before the statute, while the presence of dry grass and weeds upon the right of way of a railroad company was not conclusive evidence of negligence, yet the question of negligence was one of fact, to be determined by the jury from all the circumstances in the case. Illinois Central Railroad Co. *v.* Mills, 42 Ill. 407.

It is insisted that all the counts are bad, because they show, specifi-

[1] See also Willis *v.* Providence Telegram Pub. Co., 20 R. I. 285, 38 Atl. 947; Cooper *v.* Richland County, 76 S. C. 202, 56 S. E. 958. — ED.

cally, that the injury to decedent was not the proximate result of the negligence charged.

What is the proximate cause of an injury is ordinarily a question of fact, to be determined by the jury from a consideration of all the attending circumstances. (Fent *v.* Toledo, Peoria and Warsaw Railway Co., 59 Ill. 349; Pullman Palace Car Co. *v.* Laack, 143 id. 242; West Chicago Street Railroad Co. *v.* Feldstein, 169 id. 139.) It can only arise as a question of law or pleading when the facts are not only undisputed, but are also such that there can be no difference, in the judgment of reasonable men, as to the inferences to be drawn from them. The counts all allege, substantially, that the fire was communicated to the decedent's premises by the negligence of appellant. They all allege, substantially, that while the deceased, with all due care for her safety, was trying to extinguish the fire, her clothing was ignited and her burning and death resulted. The question presented, so far as the demurrer is concerned, is whether one who has negligently set fire to another's premises can be held liable for damages caused by burning the owner while engaged in trying, with reasonable prudence and care, to extinguish such fire.

Even though one's property has been negligently set on fire by another, the owner cannot permit it to be consumed without an effort to save it and then claim reimbursement from the setter out of the fire. He must use every reasonable effort, consistent with his personal safety, to preserve the property. (Toledo, Peoria and Warsaw Railway Co. *v.* Pindar, 53 Ill. 447; Chicago and Alton Railroad Co. *v.* Pennell, 94 id. 448.) Where a person sees his property exposed to imminent danger through the negligence of another, he is justified in using every effort to save it which a reasonably prudent person would use under similar circumstances, even though the effort exposes him to some danger which he would otherwise have avoided. Due care depends upon the circumstances surrounding the action. It is to be determined with reference to the situation in which he finds himself at the time. What is due care in one situation might be gross recklessness under different circumstances. Everyone is bound to anticipate the results naturally following from his acts. The appellant was therefore bound to anticipate, when the fire started, that the decedent would try to put it out. This she was doing, and the allegation is that she was using all due care and caution for her own personal safety. If in so doing the fire which appellant had negligently set out spread to and ignited her clothing without any want on her part of the care which an ordinarily prudent person would exercise under the circumstances, the appellant should be held to have anticipated such result as probable and to be liable therefor.

In order to make a negligent act the proximate cause of an injury it is not necessary that the particular injury, and the particular manner of its occurrence, could reasonably have been foreseen. (City of Dixon

v. Scott, 181 Ill. 116.) If the consequences follow in unbroken sequence from the wrong to the injury without an intervening efficient cause, it is sufficient if, at the time of the negligence, the wrongdoer might, by the exercise of ordinary care, have foreseen that some injury might result from his negligence. Chicago and Alton Railroad Co. *v.* Pennell, *supra;* Pullman Palace Car Co. *v.* Laack, *supra;* Chicago Hair and Bristle Co. *v.* Nueller, 203 Ill. 558.

The rule as to what constitutes proximate cause was considered in the case of Atchison, Topeka and Santa Fe Railroad Co. *v.* Stanford, 12 Kan. 354, and it was said: "Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence, and, if they are such as might with reasonable diligence have been foreseen, the last result, as well as the first and every intermediate result, is to be considered, in law, as the proximate result of the first wrong cause. But whenever a new cause intervenes which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer and except for which the final injurious consequences could not have happened, then such injurious consequences must be deemed too remote to constitute the basis of the cause of action."

In Milwaukee and St. Paul Railway Co. *v.* Kellogg, 94 U. S. 469, it is said: "The question always is, was there an unbroken connection between the wrongful act and the injury,— a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? . . . The inquiry must, therefore, always be whether there was any intermediate cause, disconnected from the primary fault and self-operating, which produced the injury."

It is true that in this case the voluntary act of the decedent intervened between the negligent act of the appellant in setting out the fire and the injury occasioned by the burning of decedent. But this act was one of the intervening causes which the appellant with reasonable diligence might have foreseen. It was a consequence of the wrongful act of appellant which it ought to have anticipated. It was not a new and independent cause intervening between the wrong and the injury or disconnected from the primary cause and self-operating, but was itself the natural result of appellant's original negligence.

The case of Seale *v.* Railway Co., 65 Texas, 274, has been cited by appellant and fully sustains its position. That case holds, that, whether the deceased was negligent or not in her attempt to put out the fire, it was this attempt, and not the original negligence of the defendant in starting the flame, that was the proximate cause of her death. This case was followed by the Missouri Court of Appeals in Logan *v.* Wabash Railroad Co., 70 S. W. Rep. 734. In the case of Chattanooga Light

and Power Co. v. Hodges, 109 Tenn. 331, the injury resulted from "an act committed by the injured party so obviously fraught with peril as should be sufficient to deter one of reasonable intelligence." The court, while reversing the judgment against the defendant, said: "The rule has been extended so as to give the injured party redress where his effort to save property has been such as a reasonably prudent man would have made under similar circumstances."

The cases which sustain the position of the appellant we think are wrong in principle and opposed to the weight of authority. One whose property is exposed to danger by another's negligence is bound to make such effort as an ordinarily prudent person would to save it or prevent damages to it. If in so doing, and while exercising such care for his safety as is reasonable and prudent under the circumstances, he is injured as a result of the negligence against the effect of which he is seeking to protect his property, the wrongdoer whose negligence is the occasion of the injury must respond for the damages. It is not just that the loss should fall on the innocent victim. We regard this as the result of the authorities which we have been able to examine, aside from the two above mentioned as sustaining the position of appellant. Berg v. Great Northern Railway Co., 70 Minn. 272; Liming v. Illinois Central Railroad Co., 81 Iowa, 246; Glanz v. Chicago, Milwaukee and St. Paul Railway Co., 119 id. 611; Wasmer v. Delaware, Lackawanna and Western Railroad Co., 80 N. Y. 212; Page v. Bucksport, 64 Me. 51.

The declaration was sufficient to support the judgment.

There was evidence tending to show that appellant had allowed dry grass and weeds to accumulate upon its right of way; that the fire started in such grass and weeds and spread to the deceased's premises immediately after the passage of a gravel train of appellant; that the deceased commenced to rake the grass and leaves on her lot and near her house, and while doing so her clothes caught fire; that the fire was started by the negligence of appellant, and that the deceased exercised ordinary care, under circumstances, for her own safety. In this condition of the record the judgment of the Appellate Court is final as to the facts.

Appellant insists that if the deceased was not guilty of contributory negligence she was injured as the result of a pure accident. But the law is well settled in this State that a defendant is liable for an injury caused to one using due care for his personal safety by the defendant's negligence concurring with an accident without which the injury would not have occurred. City of Rock Falls v. Wells, 169 Ill. 224; City of Joliet v. Schufeldt, 144 id. 403; Village of Carterville v. Cook, 129 id. 152; Armour v. Golkowska, 202 id. 144.

We find no error in the record, and the judgment will be affirmed.

Judgment affirmed.[1]

[1] See also Glanz v. Chicago M. & S. P. Ry., 119 Ia. 611, 93 N. W. 575. — Ed.

EHRGOTT v. MAYOR OF NEW YORK.

COURT OF APPEALS OF NEW YORK, 1884.

[*Reported* 96 *N. Y.* 264.]

EARL, J. This action was commenced to recover damages sustained by the plaintiff from personal injuries received by him in consequence of a defect in a street in the City of New York.[1] . . . The accident occurred in the night time, while it was raining. When the plaintiff drove into the ditch in the street his horses jumped, the axle of his carriage was broken, and he was dragged partly over the dashboard. With the assistance of men who came to his help, his horses were taken from the carriage, and he procured another carriage and harnessed his horses to that, and drove several miles to his home with his wife, sister, and son. To report the accident to the police station nearby, to change carriages and drive to his home, took several hours, and during that time he was exposed to the cold and rain, and his clothes became perfectly saturated with water. He was not that night aware that he had sustained any injury, and the next morning first became sensible of the pain in his back. Upon the trial the plaintiff gave evidence tending to show that the diseases from which he was suffering were results of the strain and shock, caused by his being dragged over the dashboard; and the defendant gave evidence tending to show that the diseases were the result of the subsequent exposure to the cold and rain. The judge, in his charge to the jury, left it to them to determine whether the injuries of which plaintiff complained were the proximate, direct result of the accident, and upon plaintiff's request he charged "that whether his personal injuries resulted from the strain experienced by him in being pulled over the dashboard, or from the exposure after the accident, the defendant is still responsible for the injuries from which the plaintiff is now suffering, provided that the jury shall find that the plaintiff was without negligence, and conducted himself with ordinary and reasonable care." To this charge defendant's counsel excepted. The judge also charged, at the request of the defendant, that "the inquiry is whether the plaintiff's conduct has augmented the mischief; if so, as the law is inadequate to apportion the wrong, there can be no recovery;" that "no punitive damages can be recovered against the city in this action; if the plaintiff is entitled to recover at all, the jury can only award compensation for such actual pecuniary loss, and pain, and suffering as were occasioned by the accident;" that "the plaintiff was bound to use ordinary prudence to avoid ill effects from the accident as well before as after the accident,

[1] Part of the opinion is omitted. — ED.

and if the exposure to the rain and wet after the breakdown occasioned the present injuries to the spine, and such exposure was not the conduct and action of a prudent man, especially in view of his ill-health, arising from his throat, then the defendant would not be responsible for it;" that "the defendant is only liable for such damages as are the natural and necessary result of the accident in question;" and he refused to charge as a part of this request, "and for such damages as might reasonably be supposed to have been in the contemplation of plaintiff and defendant, as the probable result of the accident," and to this refusal defendant's counsel excepted. He also charged the following request of the defendant: "If you find that the defendant is not responsible for the plaintiff's present sufferings, within the rules which I have just laid down, and yet find that the accident was the result of the defendant's negligence, the plaintiff would be entitled to recover for such pain and suffering as the evidence shows to be the natural and necessary result of the accident;" and he refused to charge the following requests of the defendant: "Or if you believe that such spinal sufferings, from which the plaintiff suffers, arose from the plaintiff's standing out in the cold and rain for an hour, or an hour and a half, after the breakdown, during which time the plaintiff says he got wet to the skin, or arose from his catching cold by riding home in his wet clothes, and if you believe that it was not occasioned directly by the rut in the road, but that it was the result of the plaintiff's own voluntary exposure, then I charge you that the city would not be liable therefor;" that "if the plaintiff's personal sufferings were occasioned by his getting wet to the skin, from standing outdoors, and then driving home in his wet clothes, on the night in question, then I charge you that the defendant would not be liable for them." To these refusals defendant's counsel excepted.

The defendant also requested the judge to charge "that the spinal injuries from which the plaintiff now suffers, if they were occasioned by the exposure to the wet, following the accident, as the defendant contends they were, are not the natural and necessary result of the accident, and are not such as might reasonably be supposed to have been in the contemplation of the parties as the probable outgrowth of the accident, and, therefore, in the contemplation of the law, the defendant is not liable therefor." The judge declined to charge this, except as he had already charged, and the defendant's counsel excepted.

The judge submitted written questions to the jury, which they answered as follows: First. "Are the spinal difficulties, from which the plaintiff is now suffering, the direct result of the accident — that is, the breaking of the axle, and his falling over the dashboard — or are they the result of his subsequent exposure to the wet or cold, or both?" Answer: "Of both." Second. "Was it a reasonably prudent action for the plaintiff to remain in the street, exposed to the rain and cold during the time that his journey was interrupted on the night

of the accident?" Answer: "Yes." Third. "Was it a reasonably prudent action for him to resume his journey, and drive home in his wet clothing, when, as he says he was, drenched to the skin?" Ans. "Yes." Fourth. "Did the plaintiff's exposure tend to increase or consummate whatever injury he received by the breaking of the axle and in falling over the dashboard?" Ans. "Yes."

It is sometimes said that a party charged with a tort, or with breach of contract, is liable for such damages as may reasonably be supposed to have been in the contemplation of both parties at the time, or with such damage as may reasonably be expected to result, under ordinary circumstances, from the misconduct, or with such damages as ought to have been foreseen or expected in the light of the attending circumstances, or in the ordinary course of things. These various modes of stating the rule are all apt to be misleading, and in most cases are absolutely worthless as guides to the jury. (Leonard *v.* N. Y., etc., Tel. Co., 41 N. Y. 544.) Parties when they make contracts, usually contemplate their performance and not their breach, and the consequences of a breach are not usually in their minds, and it is useless to adopt a fiction in any case that they were. When a party commits a tort resulting in a personal injury, he cannot foresee or contemplate consequences of his tortious act. He may knock a man down, and his stroke may, months after, end in paralysis or in death — results which no one anticipated or could have foreseen. A city may leave a street out of repair, and no one can anticipate the possible accidents which may happen, or the injuries which may be caused. Here nothing short of Omniscience could have foreseen for a minute what the result and effect of driving into this ditch would be. Even for weeks and months after the accident the most expert physicians could not tell the extent of the injuries.

The true rule, broadly stated, is that a wrongdoer is liable for the damages which he causes by his misconduct. But this rule must be practicable and reasonable, and hence it has its limitations. A rule to be of practicable value in the administration of the law, must be reasonably certain. It is impossible to trace any wrong to all its consequences. They may be connected together and involved in an infinite concatenation of circumstances. As said by Lord Bacon, in one of his maxims (Bac. Max. Reg. 1): "It were infinite for the law to judge the cause of causes, and their impulsion one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." The best statement of the rule is that a wrongdoer is responsible for the natural and proximate consequences of his misconduct; and what are such consequences must generally be left for the determination of the jury. (Milwaukee & St. P. R. Co. *v.* Kellogg, 94 U. S. 469.) We are, therefore, of opinion that the judge did not err in refusing to charge the jury that the defendant was liable "only for such damages as might

reasonably be supposed to have been in the contemplation of the plaintiff and defendant as the probable result of the accident."

The judge charged the jury that the defendant was liable to the plaintiff, even if the disease from which he suffered were solely due to his exposure to the cold and rain after the accident, provided he was free from fault and negligence in the exposure. I am inclined to think that there was no error in this portion of the charge. The exposure was the direct and proximate result of the accident. The plaintiff and his family were unavoidably forced from his carriage into the rain and cold by the accident, and were thus exposed to those elements in consequence of defendant's wrong. It was in the night time, and they could not remain in the carriage, and he could not avoid the rain. He was bound to exercise reasonable prudence in taking care of himself and avoiding the consequences of the wrong done. He had the option to stand in the street where the accident had placed him, or to go home, exercising reasonable prudence and the best judgment he had. There is thus such a direct connection between the accident and the exposure as to make the defendant liable for the latter. It must, however, be admitted that there is considerable authority in opposition to these views. (Hobbs *v.* L. & S. W. R. Co., L. R. 10 Q. B. 111; McMahon *v.* Field, 44 L. T. [N. S.] Ch. Div. 175; Waller *v.* M. G. W. Railway Co., 12 Ir. L. T. 145; Pullman Palace Car Co. *v.* Barker, 4 Col. 344; Indianapolis, etc., R. Co. *v.* Birney, 71 Ill. 391; Francis *v.* St. L. Transfer Co., 5 Mo. App. 7.) But the views expressed are not condemned by any authority in this State, and are fairly sustained by the cases of Williams *v.* Vanderbilt (28 N. Y. 217) and Ward *v.* Vanderbilt (4 Abb. Ct. of App. Dec. 521).

But even if the portion of the charge just referred to was erroneous, it was entirely harmless, as the jury found that the diseases from which the plaintiff suffered were the direct result both of the accident (the breaking of the axle and his falling over the dashboard) and the subsequent exposure, and that the effect of the exposure was simply to increase and aggravate the injury received from the accident. The jury found that the plaintiff was blameless for the subsequent exposure, and, therefore, so far as that operated in causing injury to the plaintiff, it was a cause for which he was not responsible. There were, according to the finding of the jury, two causes operating to produce plaintiff's injuries, each of which was essential to produce the results. The accident without the exposure, and the exposure without the accident, would not have caused them. This case then comes within the principle decided in Ring *v.* City of Cohoes (77 N. Y. 83), where it was said: "When two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate — one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible — the municipality is liable, provided the injury would not have been sus-

tained but for such defect;" and "when several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes; but it cannot be attributed to a cause unless, without its operation, the accident would not have happened." Here, as I understand the findings of the jury, the plaintiff's injuries would not have been suffered but for the strain and shock of the accident. While both causes were proximate, that was the nearest and most direct. Still further. It was certainly impossible for the plaintiff to prove, or for the jury to find, how much of the injury was due to either cause alone. It was wholly impossible to apportion the damage between the two causes. Shall this difficulty deprive the plaintiff of all remedy? We answer no. The wrong of the defendant placed the plaintiff in this dilemma, and it cannot complain if it is held for the entire damage.

We have thus examined with the care which the importance of this case seems to demand the principal questions involved upon this appeal. There are some other exceptions noticed in the brief of the learned counsel for the city, but they are not of sufficient importance to require discussion here. They do not seem to be much relied on and clearly point to no error.

The order of the General Term, reversing the judgment and granting a new trial, should be reversed, and the judgment entered upon the verdict should be affirmed, with costs of the appeal to the General Term and to this court.

All concur.

Order reversed and judgment affirmed.[1]

ECKERT v. LONG ISLAND RAILROAD CO.

COURT OF APPEALS OF NEW YORK, 1871.

[*Reported* 43 *N. Y.* 502.]

GROVER, C. J. The important question in this case arises upon the exception taken by the defendant's counsel to the denial of his motion for a non-suit, made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he for his own purposes attempted to cross the track, or with a view to save property placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence fur-

[1] See also Crowley v. West End, 149 Ala. 349, 43 So. 359.—ED.

ther showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of imperfect obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent unless such as to be regarded either rash or reckless. The jury were warranted in finding the deceased free from negligence under the rule as above stated. The motion for a non-suit was, therefore, properly denied. That the jury were warranted in finding the defendant guilty of negligence in running the train in the manner it was running, requires no discussion. None of the exceptions taken to the charge as given, or to the refusals to charge as requested, affect the right of recovery. Upon the principle above stated, the judgment appealed from must be affirmed with costs.[1]

CHURCH, C. J., PECKHAM and RAPALLO, JJ., concur.

ALLEN and FOLGER, JJ., dissented.

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HARROLD v. WATNEY.

HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION, 1898.

[*Reported* (1898) 2 *Q. B.* 320.]

A. L. SMITH, L.J. This is an application by the infant plaintiff to have judgment entered for him in a case tried before Ridley, J., and a jury. Speaking for myself, it does not seem to me that the real ques-

[1] See also Corbin v. Philadelphia, 195 Pa. 461, 45 Atl. 1070. — ED.

tion on which the case ought to have been fought was specifically determined.

The facts are that the defendant was the owner of a fence by the side of a highway, and the evidence is overwhelming that the fence was rotten and defective. A boy of four years of age was using the highway, and on the other side of the fence was ground on which boys were accustomed to play. This attracted him, and he put one foot on the fence and was about to put the other on, when the fence came down upon and injured him. The question is whether this action for the injuries so sustained can be maintained. The learned judge decided that it could not, but I cannot think that is the right view. A rotten fence close to a highway is an obvious nuisance. If I were on the highway and wanted to tie up my boot, or got tired and leaned against the fence, should I not have been lawfully using the highway? The present case is a stronger one. This boy was lawfully using the highway, and doing that which is pointed out by Lord Denman in Lynch *v.* Nurdin[1] to be a natural thing for him to do. That case has never been overruled, but has been treated in subsequent cases as sound law. The facts were that the defendant negligently left his horse and cart unattended in the street, and that the plaintiff, a child seven years old, got upon the cart in play, and another child led the horse on, and the plaintiff was thrown down and hurt. Lord DENMAN, in delivering the judgment of the court, said "But the question remains, can the plaintiff then, consistently with the authorities, maintain his action, having been at least equally in fault. The answer is that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care; the child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it. For these reasons, we think that nothing appears in the case which can prevent the action from being maintained."

That decision carries the present case, and there is, further, the case of Jewson *v.* Gatti[2] which supports it. In that case where was a cellar beside the highway in which scene-painting was going on. A bar was round the opening; a passing child naturally looked down to see what was going on; the bar gave way, and he fell into the cellar. DAY, J., non-suited the plaintiff, but the non-suit was set aside. Lord ESHER, in giving judgment, said: "This was a case of premises

[1] 1 Q. B. 29. [2] 2 Times L. R. 381, 441.

on the highway in a street where hundreds of persons and many children were passing up and down, and the area was left unprotected, without any due regard to the safety of the public, and that of itself might be sufficient to sustain a case for the plaintiff. But there was more than that. For there was painting going on in the cellar, and it must have been known that this would attract children; and then a bar was put up, ostensibly for the purpose of protection, against which children would naturally lean while looking down into the cellar where the painting was going on. This was almost an invitation, certainly an inducement, to the children to lean against the bar while looking down into the cellar. The child leant against it and it gave way, and she fell down into the area." He then said that this was a case for the consideration of the jury, and Lindley, L.J., concurred in the judgment.

I think it is the duty of this court, seeing what are the real facts of the case and the finding of the jury that the fence was very defective, not to send the case down for a new trial, but to enter the verdict for the plaintiffs for the damages assessed by the jury. The appeal must be allowed with costs.

RIGBY, L.J. I am of the same opinion. The most telling argument for the defendant was that the accident was the child's own fault, and that was the ground on which the judgment was entered for the defendant. But in neither of the cases of Lynch *v.* Nurdin nor Jewson *v.* Gatti was a similar argument permitted to prevail. I agree that judgment ought to be entered for the plaintiffs.

VAUGHAN WILLIAMS, L.J. I agree. As the case raises a question of principle which may recur, I think it right to express my view on the matter. This is an action in which it is alleged that the injury to the child arose in consequence of the condition in which the defendant left his fence adjoining the highway. The jury were not asked specifically the question whether the fence was in such a dangerous condition as to be a nuisance to those who used the highway. But on reading the evidence the only conclusion to be arrived at is that the fence, in the condition in which it was, constituted a danger to those using the highway — that is, it constituted a nuisance. When that has been settled, all has not been done to give a right of action to the plaintiff. It must also be proved that it was this nuisance which was the cause of the injury complained of. When it is urged that the child should not have put his foot on the fence, that amounts to a suggestion that the accident was not caused by the nuisance, but by the conduct of the child; and for this purpose it does not matter whether that conduct was negligence or trespass. In my view, looking at the facts of this case, it is not true to say that the accident was caused by the conduct of the child. The defendant caused a nuisance, and when asking one's self if the nuisance was the cause of the accident one gets

a test in this way: Ought what the child did to have been present to the mind of the person who created the nuisance as a probable result of this act? If he says that it was not the consequence of his act because the fence was good enough if grown-up people who were passing did not touch it, and that they had no right to touch it, the answer is that the highway is for children also, and if he leaves such a nuisance close to a highway it is exceedingly likely to cause injury to children using the highway. If that is so, it is the nuisance which was the cause of the injury to the child, and the defendant cannot get out of that conclusion by relying on the act of the child in touching the fence because that act was one which would probably not be done by a grown-up person. I come, therefore, to the conclusion that it has been established by the evidence that not only was the fence a nuisance, but that the injury to the child was the result of that nuisance.[1]

Appeal allowed.

HENRY v. ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY CO.

SUPREME COURT OF MISSOURI, 1882.

[*Reported* 76 *Mo.* 288.] 248 Fd 2

HOUGH, J. This is an action to recover damages on account of certain personal injuries received by the plaintiff and resulting from his being knocked down and run over by a flat car of the defendant while standing behind said car and between the rails of one of defendant's tracks in its switchyard, in the town of Moberly, on the night of September 7th, 1876.

On the day of said 7th of September, the firm of Platter, Crow & Co., of which plaintiff was a member, shipped a car load of horses from Chillicothe to St. Louis, over the railway of the defendant, under a contract which entitled the plaintiff to transportation on the train hauling his stock. He got on the caboose car of the freight train on which his stock was, at Brunswick, and reached Moberly in safety about 11 o'clock P. M. of the same day. When the train reached the roundhouse west of the passenger depot at Moberly, the caboose was detached and the train was run down into the lower end of the company's yard, east of the passenger depot, where a train was to be made up to go on to St. Louis, having in it the car containing plaintiff's

[1] See also True & True Co. v. Woda, 201 Ill. 315, 66 N. E. 369; Edgington v. Burlington C. R. & N. Ry., 116 Ia. 410, 90 N. W. 95; Fishburn v. Burlington & N. W. Ry., 127 Ia. 483, 103 N. W. 481; Briscoe v. Henderson L. & P. Co., 148 N. C. 396, 62 S. E. 600; Little v. James McCord Co. (Tex. Civ. App.), 151 S. W. 835. — ED.

stock. When the caboose was detached, the brakeman said to to plaintiff, "You get out and go down to the other caboose; this caboose goes no further." Plaintiff was also informed that his train would start from the lower or eastern end of the yard, in the course of an hour or two. Thereupon plaintiff and one Wagner, who was also going to St. Louis on the same train with plaintiff, got out, and walked to the depot, and after remaining there about an hour, went eastward to the lower end of the yard to find their train. The night was quite dark, neither moon nor stars were shining, but it was light enough to enable plaintiff to distinguish his gray horses in the car, when close to them. When he found the train containing his stock, which appeared to be made up and ready to go, he and Wagner walked immediately back to the east or forward end of the caboose, which was at the rear or west end of the train, and got upon the platform of that car. Wagner tried the door of the caboose, but failed to open it, and after remaining on the platform a few moments, the plaintiff becoming uneasy, tried the door and opened it and walked in. The car was dimly lighted by a lantern, and, as plaintiff was about to seat himself, some person who was reclining on the opposite side of the caboose asked him what he was doing in there. The plaintiff stated that he had stock upon the train, whereupon the other gruffly said: "Get out of here; the train is not ready." Plaintiff thereupon went out on the platform of the car, where Wagner was, and the two remained there several minutes conversing and studying what to do. The yard contained five parallel tracks. The car on which they stood was on the center track, and there were two tracks on either side, with spaces between about six feet wide. Plaintiff had never been in the yard before, but he knew it was the switchyard of defendant. Wagner stepped down from the platform of the caboose and turned to go west toward the depot; the plaintiff also left the platform, but, wishing to remain near the caboose so he could conveniently jump on when they commenced pulling up the train, he walked south across the first track, which was unobstructed as far as he could see, both east and west, and went to the second track, and stepped between the rails of the second track immediately behind the east end of a flat car which was standing on said track, intending to get upon the flat car and remain there until his train was ready to start. There were other cars west of the flat car, but none east of it. As plaintiff stepped upon the track he put his hand upon the flat car, and finding that they had been hauling dirt upon it concluded that he would not soil his clothes by getting upon it, and he then turned around and was standing with his back toward the car, and was about to move away, when the flat car was struck by cars pushed against it from the west, and it ran over him, crushing his leg. Plaintiff heard no engine or train in motion to the rear of him, before he heard the noise made by the concussion of the cars, when he was struck, and he saw no light in the direction from which the cars

came, and no light in the yard, save one to the east, and near the forward end of the train on which his stock was. Plaintiff testified that he saw no yardman or brakeman in the yard, at or before the time of his injury; that, if there were any near enough to see him, he did not see them, and that if there had been a brakeman on the rear of the train pushed in on the track on which he was injured, such brakeman could not have seen him at the distance of two or three car lengths. The foregoing are all the material facts that appear in the testimony for the plaintiff, and no additional facts material to the plaintiff's case appear in the testimony offered by the defendant.

That portion of the petition, which sets forth the facts constituting the negligence of the defendant, relied upon as giving a right of recovery, is as follows:

"Plaintiff avers that he was rightly in said caboose car, and that he had the right to be and remain there, and to be conveyed therein to the city of St. Louis. But plaintiff avers the further fact to be, that defendant, by its agents and employees in charge of said train and caboose, so made up anew, wrongfully, and by force and violence, and without any cause or provocation whatsoever, drove out and expelled him (plaintiff) from out of said caboose into the midst of said exceeding great number of side car tracks and cars then and there being standing, into a place of great danger; and plaintiff avers that at once and immediately, and before he had time or could extricate himself from the networks of said car tracks and cars surrounding him, the defendant, by its agents and employees, so negligently run, managed and backed up another car, or another train of cars, standing on another car track, or switch of same main car track, to which plaintiff had fled when expelled, as aforesaid, from the caboose aforesaid, and that the defendant had no light on the portion of car track, or switch of car track aforesaid, and gave no notice, by ringing of bells or otherwise, to him of moving, running, managing or backing up of any train, or car of any train, on said car tracks, or any switch of said car track, and that he (plaintiff) was, without fault or negligence on his part, and without warning, struck in the back and knocked down and run over by said train so moved, run, managed, and backed up as aforesaid, whereby plaintiff was then and there greatly injured, damaged, etc."

When there is no conflict in the testimony, and all the causes contributing to produce an injury are known and unquestioned, whether a given act in the chain of causation is the remote or proximate cause of such injury, is a question of law for the court.

We think it quite plain that the command of the occupant of the caboose to the plaintiff to "get out of there" was not the proximate cause of his injury. Conceding that the plaintiff's expulsion from the interior of the caboose was an unlawful act on the part of the defendant, although the person who ordered him out was not shown to be an

employee of defendant and the rules of the company were not offered in evidence, still, the plaintiff was not driven from the platform of the caboose, where, from aught that appears, he might have remained in undisturbed security, until the train was ready to start; nor was he driven, directed, or invited, by any servant of the defendant, into a place of danger from which he was unable to rescue himself before he was run over and injured. It is perfectly manifest from the testimony, that the plaintiff voluntarily and deliberately, in the free exercise of his own judgment and discretion, and for his own convenience, took his station behind the car by which he was injured; and there is not even a scintilla of testimony to the contrary. This voluntary action of the plaintiff, and his consequent injury, cannot in any legal sense be said to have been occasioned by his expulsion from the caboose. They succeeded such expulsion, but they were not the natural, ordinary, or probable consequences thereof, and, therefore, not the proximate result of such expulsion. Wharton on Negligence, 200, §§ 134, 138; Haley v. R. R. Co., 21 Iowa, 15. "The spontaneous action of an independent will," intervened between the expulsion from the car and the injury. The plaintiff acted neither in precipitation, nor under excitement caused by the defendant, but freely and deliberately, and under no compulsive necessity to go where he did. If any injury had happened to him while in the act of prudently obeying the order to get out of the caboose, such injury would have been the proximate result of his expulsion; but after he was out of the caboose, he was entirely free to select his own position, and did so after some minutes of meditation and consultation as to what course he should pursue.

It is perhaps probable that if the plaintiff had not been ordered out of the caboose, he would not have been injured, but this hypothesis does not establish the legal relation of cause and effect between the expulsion and the injury. If the plaintiff had not left home he certainly would not have been injured as he was, but his leaving home could not, therefore, be declared to be the cause of his injury. As the plaintiff's injury was neither the ordinary, natural, nor probable consequence of his expulsion from the caboose, such expulsion, however it might excite our indignation, in the absence of any regulation of the defendant to justify it, cannot be considered in this action, and the legal aspect of the case is precisely the same that it would have been if no such expulsion had taken place. It is to be regarded as if the plaintiff had gone to the caboose and could not get in because it was locked, or, being able to get in, chose to remain outside. If the plaintiff at the time he was injured had been on his way to the caboose or otherwise lawfully crossing the track, and before crossing the same had looked and listened and could neither see nor hear an approaching train, he would undoubtedly have a right of action. But he had reached the caboose in safety, and being forbidden to remain inside, and not choosing to occupy the platform, or to stand in the open spaces between the

tracks, voluntarily and without any necessity therefor, put himself in a place of danger between the rails on one of the switch-tracks, with knowledge of the fact that he was in defendant's yard, where its cars were shifted and its freight trains were made up. If the plaintiff had taken a seat on the flat car and by the concussion which took place had been thrown down and run over, it certainly could not be claimed that he would be entitled to recover. He had no right as a passenger or otherwise to get on that car because he had been ordered out of the caboose in which he had a right to be. If there could be no recovery in the case put, we do not see how the plaintiff can have any greater right to recover, because he was injured in the attempt to get on said car.

As the plaintiff was on the defendant's track under such circumstances as did not create any duty on its part toward him, beyond that of not wilfully injuring him, it is unnecessary to consider whether the servants of the defendant were guilty of any negligence in not having lights and a brakeman on the train backed in from the west or in not sounding a whistle or ringing a bell. Hallihan *v.* R. R. Co., 71 Mo. 113; Van Shaick *v.* R.R. Co., 43 N. Y. 527.

The negligence of the plaintiff disclosed by his own testimony must debar him from recovery. We are of opinion that the circuit court erred in not sustaining the demurrer to the evidence, and its judgment will, therefore, be reversed. The other judges concur, except NORTON, J., who dissents.[1]

SNOW *v.* NEW YORK, NEW HAVEN & HARTFORD R. R. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1904.

[*Reported* 185 *Mass.* 321.]

MORTON, J. These are two actions of tort which were tried together. The first is for injuries received by the female plaintiff in a collision on the defendant's railroad on December 16, 1899, while a passenger, and the second is by the husband for expenses and loss of consortium. The liability was admitted and the only question in each case was the amount of the damages. The verdicts were unsatisfactory to the plaintiffs, and the cases are here on their exceptions to certain rulings and instructions and to the admission of certain testimony.

There was testimony tending to show that as the result of the injuries received the female plaintiff became subject to attacks of dizziness which continued at intervals from the time of her injury down to the time of the trial, which occurred in May, 1903, and there was testi-

[1] See Lewis *v.* Flint & P. M. R. R., 54 Mich. 55. — ED.

mony tending to show that on one occasion, when alone in her home several months before the trial, she got into a pantry sink by means of a chair to see about a leak in the water pipe above the sink, and while standing in the sink had an attack of dizziness, and fell to the floor and broke her wrist. She offered to show the pain and other inconveniences which she suffered from the broken wrist, but the judge excluded the evidence, and instructed the jury not to consider the consequences of the broken wrist, as they were too remote, and the defendant was not responsible. The plaintiff excepted to these rulings and instructions, and this constitutes the first exception.

The case of Raymond *v.* Haverhill, 168 Mass. 382, would be decisive on this point except for the fact that it was a highway case. It was held in that case that the plaintiff whose right ankle had been injured by a defect in a sidewalk in the defendant city so that it became weak and was liable at times to turn and fail to support her could not recover for injuries received by her in consequence of a fall due to the failure of the ankle to support her as she was stepping from a chair to a settee while assisting in preparing for an entertainment in a public hall. It was held that the injuries so received were not the direct and immediate results of the injury received in consequence of the defect in the public way, but were due to a new and independent cause. It is true that cities and towns are not liable for consequential injuries resulting from defects in the public ways. Nestor *v.* Fall River, 183 Mass. 265. But there was a strong intimation in Raymond *v.* Haverhill, *ubi supra*, that, if the action had been for negligence at common law, the later injuries could not have been considered as the natural and proximate result of the injury received in consequence of the defect in the sidewalk. And if in that case what took place was regarded as constituting a new and intervening cause, as it was, we do not see how what took place in the present case can be otherwise regarded. The breaking of the wrist certainly was not the direct result of the collision. That caused or may have caused conditions which contributed to it, and but for whose existence it perhaps would not have happened. The breaking of the wrist was due not to the collision, but to her conduct in getting up into the pantry sink to look at the leak in the water pipe, and was the result of voluntary and independent action on her part. The plaintiff relies, amongst other cases, on Brown *v.* Chicago, Milwaukee & St. Paul Railway, 54 Wis. 342. But this court expressly declined to follow that case in Raymond *v.* Haverhill, *ubi supra*. We think that this exception also must be overruled.

The remaining exception relates to the admission of two communications sent by the plaintiff to the defendant. The plaintiff objected to their admission on the ground that they related to a compromise of the plaintiff's claim. The letters cannot be regarded as offers of compromise. They were a statement of the plaintiff's claim and of the

amount which she demanded, and were admissible as bearing upon the genuineness and extent of her injuries. See Snow v. Batchelder, 8 Cush. 513; Harrington v. Lincoln, 4 Gray, 563.

Exceptions overruled.[1]

REGINA v. HOLLAND.

LIVERPOOL ASSIZES. 1841.

[*Reported* 2 *Moody & Robinson*, 351.]

INDICTMENT for murder. The prisoner was charged with inflicting divers mortal blows and wounds upon one Thomas Garland, and (among others) a cut upon one of his fingers.

It appeared by the evidence that the deceased had been waylaid and assaulted by the prisoner, and that, among other wounds, he was severely cut across one of his fingers by an iron instrument. On being brought to the infirmary, the surgeon urged him to submit to the amputation of the finger, telling him, unless it were amputated, he considered that his life would be in great hazard. The deceased refused to allow the finger to be amputated. It was thereupon dressed by the surgeon, and the deceased attended at the infirmary from day to day to have his wounds dressed; at the end of a fortnight, however, lock-jaw came on, induced by the wound on the finger; the finger was then amputated, but too late, and the lock-jaw ultimately caused death. The surgeon deposed that if the finger had been amputated in the first instance, he thought it most probable that the life of the deceased would have been preserved.

For the prisoner, it was contended that the cause of death was not the wound inflicted by the prisoner, but the obstinate refusal of the deceased to submit to proper surgical treatment, by which the fatal result would, according to the evidence, have been prevented.

MAULE, J., however, was clearly of opinion that this was no defence, and told the jury that if the prisoner wilfully, and without any justifiable cause, inflicted the wound on the party, which wound was ultimately the cause of death, the prisoner was guilty of murder; that for this purpose it made no difference whether the wound was in its own nature instantly mortal, or whether it became the cause of death by reason of the deceased not having adopted the best mode of treatment; the real question is whether in the end the wound inflicted by the prisoner was the cause of death. *Guilty.*[2]

[1] See Weiting v. Millston, 77 Wis. 523, 46 N. W. 879. — ED.

[2] *Acc.* Com. v. Hackett, 2 All. 136. — ED.

ST. LOUIS & SAN FRANCISCO RAILROAD CO. *v.* LEAGUE.

SUPREME COURT OF KANSAS, 1905.

[*Reported* 71 *Kan.* 79.]

JOHNSTON, C. J. About nine o'clock on the night of January 6, 1903, a locomotive attached to a train of the St. Louis & San Francisco Railroad Company scattered fire along the track and started a fire upon the farm of L. E. League. It burned a stalk field, hedge, and other fences, fruit and ornamental trees, as well as barns, sheds, and cribs. The Leagues and their neighbors, as well as the sectionmen of the railroad company, turned out and fought the fire, and succeeded in arresting its progress. Although not entirely extinguished, most of those who were assisting, including the railroad men, concluded that the danger was past, and left the premises. The fire was still burning to some extent in piles of manure, and also in other débris, but, as the night was cold, the parties did not prolong their stay beyond what they deemed to be necessary. Shortly after midnight Mr. and Mrs. League, who were greatly exhausted, retired; but their sons remained longer watching the fire. In addition to other precautions, they plowed a number of furrows as a fire guard between the burned section and the buildings and the stacks. About two o'clock they went into the house and retired. Shortly afterwards the family was awakened to find that the fire had fanned up and jumped across to a straw stack, and thence to the buildings, and the result was that a great deal of property was destroyed. Separate actions were brought by Mr. and Mrs. League, charging that their losses were the result of the negligence of the railroad company. The causes were consolidated by consent and tried as one action. The jury found in favor of the plaintiffs, awarding Mrs. League $438, and Mr. League $1,510.

There is abundant evidence to sustain the allegation that the fire was originally started by the railroad company, and also that it was negligently done. No complaint is made of the rulings upon evidence, nor that the special findings, ninety-eight in number, are not supported by the testimony. It is practically conceded that the railroad company is responsible for the property destroyed by the fire before it was arrested at midnight, but it is contended that the company is not liable for the property destroyed after the fire was revived, and this constituted the greater part of the loss which was sustained. It is argued that the fire set out by the locomotive was not the proximate cause of this loss; that a person of ordinary intelligence and prudence could not have foreseen or anticipated such a result; that it was not foreseen by the Leagues and their neighbors when the fire was first subdued; and, if they did not anticipate a further spread of the fire, the company cannot be expected to have originally foreseen the actual and final result. It is argued that after the cessation of the fire the re-kindling and later spread of it was an independent,

intervening cause between the original setting of the fire and the final result.

Within our own decisions the original fault in starting the fire may be deemed to be the proximate cause of the entire loss.[1] . . . The only circumstance which gives rise to any question was the temporary detention of the fire. The arrest of the flames for a time, however, did not start a new fire, nor furnish a new cause or force which destroyed the League property. It operated rather to diminish the destructive force of a fire which had been negligently started, and which had never been extinguished. There was continuity in the fire, and the fact that it should be partially subdued, and then fanned up and carried along by the wind, is not outside of the bounds of reasonable anticipation. That those fighting the fire did not entirely extinguish it goes more to the question of contributory negligence than to the matter of proximate cause. If, in fighting the fire, the parties had added a new element, or put in force an independent agency, which destroyed the property, there would be some reason for the contention that is made. For instance, if unnecessary back fires had been started, or inflammable material added to the slumbering fire, or an explosion had occurred in the track of the fire, or a tornado had arisen and carried the fire a great distance, or some other extraordinary and unlooked-for thing had intervened, there might be room to contend that the final burning was not within the usual, ordinary, and experienced course of events. We think, however, that it cannot be arbitrarily said that the efforts to stay the progress of the fire, and its temporary detention, was a new and independent cause; nor that the spread of the fire and final destruction of the property was something unlikely to happen as a result of the original starting of the fire. Under the circumstances, and within the authorities of our own and other courts, the question of whether the fire started by the railroad company was the proximate cause of the final burning, or that the loss was only a remote consequence, was a question of fact for the jury, and there is undoubtedly sufficient evidence to support the finding of the jury. Railroad Co. *v.* Stanford, 12 Kan. 354; Railroad Co. *v.* Bales, 16 Kan. 252; Railway Co. *v.* McCollum, 2 Kan. App. 319; Railway Co. *v.* McBride, 54 Kan. 173; Buck *v.* Railway Co., 59 Kan. 328; Railway Co. *v.* Blaker, 68 Kan. 244; Railway Co. *v.* Nitsche, 126 Ind. 229; Poeppers *v.* M. K. & T. Ry Co., 67 Mo. 715; Hightower *v.* M. K. & T. Ry. Co., 67 Mo. 726; Tyler *v.* Ricamore, 87 Va. 466; Railway Co. *v.* Kellogg, 94 U. S. 473; 1 Thompson on Negligence, § 161; 13 A. & E. Ency. of Law (2d ed.) 446, and cases cited.

Whether the Leagues exercised the care which a prudent person should in extinguishing the fire, in watching it after it was arrested, and in protecting their property as against a re-kindling of the fire, was submitted to the jury under instructions of which the railroad company has no cause to complain. After the fire was discovered, it

[1] Part of the opinion is omitted. — Ed.

was the duty of the plaintiffs below to take all reasonable and practical means to extinguish it and to protect their property. Only reasonable diligence, however, was required in this respect, and it cannot be said as a matter of law that such care was not exercised by them. Whether parties who make efforts to stay the progress of a fire negligently started have used due care in this regard is ordinarily a question for the jury. Having fought and partially subdued the fire, and then mistakenly supposed that the fire guards made and the precautions taken to prevent a further spread of the fire were sufficient, and that the danger was past, makes the matter of whether they have used reasonable care peculiarly one for the determination of the jury.

HENDRICKSON *v.* COMMONWEALTH.

COURT OF APPEALS OF KENTUCKY. 1887.

[*Reported* 85 *Kentucky*, 281.]

JUDGE LEWIS delivered the opinion of the court: —

Under an indictment for the murder of his wife, appellant was convicted of manslaughter.

From the testimony of a daughter of the deceased and step-daughter of appellant, the only person present at the time, it appears that a difficulty took place at their residence at night after they had retired to bed, in the winter of 1885–86, and, in the language of the witness, occurred as follows: "The sow rooted open the door of the cabin, and they (her mother and father) fell out over driving her out, and he choked, beat, scratched, and struck her, and she knocked him down with the iron shovel, and got on him, choked him, and asked him how he felt; and he started towards his breeches and said: 'If I had my knife — I will get my knife and I 'll cut your dog gon'd throat;' and that she ran out at the door and did not return that night; that he shut the door after her and propped it with a stick of wood and went to bed." She further stated that next morning she went to look for her mother and found her lying in the snow dead, and when she started appellant told her to take her mother's shoes and stockings.

The statement to the jury, made by appellant himself, is, that the deceased commenced the fight, getting him down on the floor, when he choked and bit her, and she then knocked him down with an iron shovel, and got on and choked him, and then jumped up and ran out of the door, saying she would have him arrested and put in jail. He, however, admits he said to her that if he had his knife he would cut her, and started for his breeches.

From the testimony of a witness it appears that the place where the deceased lay was within about one hundred yards of his house, and about half mile of her residence, and that in going to the place where she was found she had passed by the gate of another person, and

within twenty feet of his house, which was two hundred and fifty yards nearer her own residence than was the place where she died. When found she was lying on her face dead and badly frozen, the weather being extremely cold, and where she lay were signs of stirring in the snow, which was about eighteen inches deep. When she left her residence she was barefooted and had on very little clothing, and along the route she took, which led through briers, there were small quantities of blood and fragments of clothing that had been torn off by the briers; and at another place she had struck her ankle against the end of a log and it bled freely. The witnesses testify that there were scratches on each side of her neck, and finger-prints on her throat, and prints of teeth on her left arm and back of her hands, and her legs from knees down were lacerated by the briers. According to the testimony of a physician, she was eight months and one week gone in pregnancy; but she had no wound, bruise, or other mark of violence that could have produced death. He also testified that appellant was badly crippled and paralyzed in one arm, and that on the day of his examining trial he had a considerable bruise about his face and a bad-looking one about the eye.

There is evidence that the deceased was a high-tempered woman, hard to get along with. She told a witness of fighting and whipping her husband, who was a cripple, and had but one arm he could use, though the daughter testifies that in their fights he whipped her. It further appears that she had on other occasions ran off and left her husband, and at one time she came to the house of a witness and stayed all night, leaving a young baby with her husband, saying to the witness that she had got mad and run off.

The lower court refused to instruct the jury, at the instance of appellant's counsel, that before finding him guilty they must believe the death of his wife was produced by him alone and in no other way; and also refused to instruct that in order to convict they must believe he intentionally exposed her, or forced her to expose herself, to the cold under such circumstances that her death would be the probable and natural consequence of such exposure, and that she died from such exposure; but in lieu of those asked by his counsel, gave the following: "If the jury believe . . . that the defendant . . . in sudden heat and passion, and not in his necessary or reasonably necessary self-defence, used such force and violence towards his wife as to cause her to leave his house from fear of death or great bodily harm at his hands, and from exposure to cold her death was produced by the said act of the defendant, they should find him guilty of manslaughter," etc.

"Forcing a person to do an act which causes his death renders the death the guilty deed of him who compelled the deceased to do the act; and it is not material whether the force be applied to the body or to the mind; but if it were the latter, it must be shown there was the apprehension of immediate violence, and well-grounded from the circumstances by which the deceased was surrounded. And it need not

appear that there was no other way of escape; but it must appear that the step was taken to avoid the threatened danger, and was such as a reasonable man might take." Russell on Crimes, 489; 3 Greenleaf on Evidence, section 142.

In a case where the evidence was that the defendant, a husband, beat his wife and threatened to throw her out of the window and to murder her, and that by such threats she was so terrified that, through fear of his putting his threats into execution, she threw herself out of the window, and of the beating and bruises received by the fall she died, it was held that if her death was occasioned partly by the blows, and partly by the fall, yet if she was constrained by her husband's threats of further violence, and from a well-grounded apprehension of his doing such further violence as would endanger her life, he was answerable for the consequences of the fall as much as if he had thrown her out of the window himself. And in another case, where the deceased, from a well-grounded apprehension of a further attack which would have endangered his life, endeavored to escape, and in so doing was fatally injured from another cause, it was held murder. (See Wharton on Homicide, section 374, where these and other cases are cited.)

The case of State v. Preslar, 3 N. C. 421, was where, after the husband had desisted from beating his wife, she went off a little distance in the yard and sat down, and the husband, after about five minutes, went into the house and laid upon the bed with his clothes on, and about half an hour afterwards she started, in company with her son, to the house of her father, about two miles off; but when she got within two hundred yards of her father's house she said she did not wish to go there until morning, it being in the night-time, and laid down on a bed-quilt in the woods. Early next morning she gave notice to the inmates of the house of her presence, but was not able to walk there, and the next day died. In that case the court decided that as she had exposed herself thus without necessity, and there were, besides, circumstances showing deliberation in leaving her home, the husband could not be held responsible to the extent of forfeiting his life. But the court at the same time said that "if, to avoid the rage of a brutal husband, a wife is compelled to expose herself by wading through a swamp or jumping into a river, the husband is responsible for the consequences."

The question before us is, whether, tested by the principles stated and illustrated, the instruction quoted correctly and fully embodies the law applicable to this case.

It will be perceived that the jury were authorized, by the instruction, to convict, if they believed the accused used such force and violence as to cause the deceased to leave the house from fear of death or great bodily harm at his hands. But they were not instructed, as they should have been before convicting, to believe, nor permitted to inquire, whether or not such fear was well grounded or reasonable. The jury

might, and from their verdict doubtless did, believe she left the house from fear of death or great bodily harm, yet, if they had taken into consideration the previous conduct of the deceased, her disposition and ability to fight with her husband, their comparative physical powers, and all the circumstances proved in the case, they might not have believed her fear was well grounded or reasonable, and unless it was, the accused should not be held responsible for her death, for in such case he could not be regarded as forcing her to leave the house.

The jury should have been further instructed that, to convict, they must believe the death of the wife by freezing was the natural and probable consequence of leaving the house at the time and under the circumstances.

There is no evidence the accused prevented her re-entrance into the house, as assumed in the instruction in regard to murder, and it was error to make reference thereto. For the errors indicated, the judgment is reversed for a new trial, and other proceedings consistent with this opinion.

REGINA v. DALLOWAY.

STAFFORD ASSIZES. 1847.

[*Reported* 2 *Cox C. C.* 273.]

THE prisoner was indicted for the manslaughter of one Henry Clarke, by reason of his negligence as driver of a cart.

It appeared that the prisoner was standing up in a spring-cart, and having the conduct of it along a public thoroughfare. The cart was drawn by one horse. The reins were not in the hands of the prisoner, but loose on the horse's back. While the cart was so proceeding down the slope of a hill, the horse trotting at the time, the deceased child, who was about three years of age, ran across the road before the horse, at the distance of a few yards, and one of the wheels of the cart knocking it down and passing over it caused its death. It did not appear that the prisoner saw the child in the road before the accident.

Spooner, for the prosecution, submitted that the prisoner, in consequence of his negligence in not using reins, was responsible for the death of the child; but

ERLE, J., in summing up to the jury, directed them that a party neglecting ordinary caution, and, by reason of that neglect, causing the death of another, is guilty of manslaughter; that if the prisoner had reins, and by using the reins could have saved the child, he was guilty of manslaughter; but that if they thought he could not have saved the child by pulling the reins, or otherwise by their assistance, they must acquit him.

The jury acquitted the prisoner.

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SCHEFFER *v.* WASHINGTON CITY, VIRGINIA MIDLAND, AND GREAT SOUTHERN RAILROAD CO.

SUPREME COURT OF THE UNITED STATES, 1881.

[*Reported* 105 *U. S.* 249.]

MILLER, J. The plaintiffs, executors of Charles Scheffer, deceased, brought this action to recover of the Washington City, Virginia Midland, and Great Southern Railroad Company damages for his death, which they allege resulted from the negligence of the company while carrying him on its road. The defendant's demurrer to their declaration was sustained, and to reverse the judgment rendered thereon they sued out this writ of error.

The statute of Virginia, under which the action was brought, is, as to the question raised on the demurrer, identical with those of all the other States, giving the right of recovery when the death is caused by such default or neglect as would have entitled the party injured to recover damages if death had not ensued.

The declaration, after alleging the carelessnes of the officers of the company, by which a collision occurred between the train on which Scheffer was and another train, on the seventh day of December, 1874, proceeds as follows:

"Whereby said sleeping-car was rent, broken, torn, and shattered, and by means whereof the said Charles Scheffer was cut, bruised, maimed, and disfigured, wounded, lamed, and injured about his head, face, neck, back, and spine, and by reason whereof the said Charles Scheffer became and was sick, sore, lame, and disordered in mind and body, and in his brain and spine, and by means whereof phantasms, illusions, and forebodings of unendurable evils to come upon him, the said Charles Scheffer, were produced and caused upon the brain and mind of him, the said Charles Scheffer, which disease, so produced as aforesaid, baffled all medical skill, and continued constantly to disturb, harass, annoy, and prostrate the nervous system of him, the said Charles Scheffer, to wit, from the seventh day of December, A.D. 1874, to the eighth day of August, 1875, when said phantasms, illusions, and forebodings, produced as aforesaid, overcame and prostrated all his reasoning powers, and induced him, the said Charles Scheffer, to take his life in an effort to avoid said phantasms, illusions, and forebodings, which he then and there did, whereby and by means of the careless, unskillful, and negligent acts of the said defendant aforesaid, the said Charles Scheffer, to wit, on the eighth day of August,

1875, lost his life and died, leaving him surviving a wife and children."

The Circuit Court sustained the demurrer on the ground that the death of Scheffer was not due to the negligence of the company in the judicial sense which made it liable under the statute. That the relation of such negligence was too remote as a cause of the death to justify recovery, the proximate cause being the suicide of the decedent — his death by his own immediate act.

In this opinion we concur.

Two cases are cited by counsel, decided in this court, on the subject of the remote and proximate causes of acts where the liability of the party sued depends on whether the act is held to be the one or the other; and, though relied on by plaintiffs we think they both sustain the judgment of the Circuit Court.

The first of these is Insurance Company v. Tweed, 7 Wall. 44.

In that case a policy of fire insurance contained the usual clause of exception from liability for any loss which might occur "by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, explosion, earthquake, or hurricane."

An explosion took place in the Marshall warehouse, which threw down the walls of the Alabama warehouse — the one insured, situated across the street from Marshall warehouse — and by this means, and by the sparks from the Eagle Mill, also fired by the explosion facilitated by the direction of the wind, the Alabama warehouse was burned. This court held that the explosion was the proximate cause of the loss of the Alabama warehouse, because the fire extended at once from the Marshall warehouse, where the explosion occurred. The court said that no new or intervening cause occurred between the explosion and the burning of the Alabama warehouse. That if a new force or power had intervened, sufficient of itself to stand as the cause of the misfortune, the other must be considered as too remote.

This case went to the verge of the sound doctrine in holding the explosion to be the proximate cause of the loss of the Alabama warehouse; but it rested on the ground that no other proximate cause was found.

In Milwaukee & St. Paul Railway Co. v. Kellogg (94 U. S. 469), the sparks from a steam ferryboat had, through the negligence of its owner, the defendant, set fire to an elevator. The sparks from the elevator had set fire to the plaintiff's saw mill and lumber yard, which were from three to four hundred feet from the elevator. The court was requested to charge the jury that the injury sustained by the plaintiff was too remote from the negligence to afford a ground for a recovery.

Instead of this, the court submitted to the jury to find "whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which under the circumstances would not naturally follow

from the burning of the elevator, and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected."

This court affirmed the ruling, and in commenting on the difficulty of ascertaining, in each case, the line between the proximate and the remote causes of a wrong for which a remedy is sought, said: "It is admitted that the rule is difficult. But it is generally held that, in order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." To the same effect is the language of the court in McDonald *v.* Snelling, 14 Allen (Mass.), 290.

Bringing the case before us to the test of these principles, it presents no difficulty. The proximate cause of the death of Scheffer was his own act of self-destruction. It was within the rule in both these cases a new cause, and a sufficient cause of death.

The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that "great first cause least understood," in which the train of all causation ends.

The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train.

His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him and his death.[1]

Judgment affirmed.

[1] See Brown *v.* American S. & W. Co., 43 Ind. App. 560, 88 N. E. 80; Daniels *v.* New York, N. H., & H. R. R., 183 Mass. 393, 67 N. E. 424; Malone *v.* Cayzer, 45 Scot. L. R. 351, Smith Cas. Torts, 46. — Ed.

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PEOPLE v. LEWIS.

SUPREME COURT OF CALIFORNIA. 1899.

[*Reported* 124 *Cal.* 551.]

TEMPLE, J.[1] . . . Defendant and deceased were brothers-in-law, and not altogether friendly, although they were on speaking and visiting terms. On the morning of the homicide the deceased visited the residence of the defendant, was received in a friendly manner, but after a while an altercation arose, as a result of which defendant shot deceased in the abdomen, inflicting a wound that was necessarily mortal. Farrell fell to the ground, stunned for an instant, but soon got up and went into the house, saying: "Shoot me again; I shall die anyway." His strength soon failed him, and he was put to bed. Soon afterward, about how long does not appear, but within a very few minutes, when no other person was present except a lad about nine years of age, nephew of the deceased and son of the defendant, the deceased procured a knife and cut his throat, inflicting a ghastly wound from the effect of which, according to the medical evidence, he must necessarily have died in five minutes. The wound inflicted by the defendant severed the mesenteric artery, and medical witnesses testified that under the circumstances it was necessarily mortal, and death would ensue within one hour from the effects of the wound alone. Indeed, the evidence was that usually the effect of such a wound would be to cause death in less time than that, but possibly the omentum may have filled the wound, and thus, by preventing the flow of the blood from the body, have stayed its certain effect for a short period. Internal hemorrhage was still occurring, and, with other effects of the gunshot wound, produced intense pain. The medical witnesses thought that death was accelerated by the knife wound. Perhaps some of them considered it the immediate cause of death.

Now, it is contended that this is a case where one languishing from a mortal wound is killed by an intervening cause, and, therefore, deceased was not killed by Lewis. To constitute manslaughter, the defendant must have killed some one, and if, though mortally wounded by the defendant, Farrell actually died from an independent intervening cause, Lewis, at the most, could only be guilty of a felonious attempt. He was as effectually prevented from killing as he would have been if some obstacle had turned aside the bullet from its course and left Farrell unwounded. And they contend that the intervening act was the cause of death, if it shortened the life of Farrell for any period whatever.

The attorney general does not controvert the general proposition here contended for, but argues that the wound inflicted by the defend-

[1] Part of the opinion is omitted. — ED.

ant was the direct cause of the throat cutting, and, therefore, defendant is criminally responsible for the death. He illustrates his position by supposing a case of one dangerously wounded, and whose wounds had been bandaged by a surgeon. He says, suppose through the fever and pain consequent upon the wound the patient becomes frenzied and tears away the bandage, and thus accelerates his own death; would not the defendant be responsible for a homicide? Undoubtedly he would be, for in the case supposed the deceased died from the wound, aggravated, it is true, by the restlessness of the deceased, but still the wound inflicted by the defendant produced death. Whether such is the case here is the question.

The attorney general seems to admit a fact which I do not concede, that the gunshot wound was not, when Farrell died, then itself directly contributory to the death. I think the jury were warranted in finding that it was. But if the deceased did die from the effect of the knife wound alone, no doubt the defendant would be responsible, if it was made to appear, and the jury could have found from the evidence, that the knife wound was caused by the wound inflicted by the defendant in the natural course of events. If the relation was causal, and the wounded condition of the deceased was not merely the occasion upon which another cause intervened, not produced by the first wound or related to it in other than a causal way, then defendant is guilty of a homicide. But, if the wounded condition only afforded an opportunity for another unconnected person to kill, defendant would not be guilty of a homicide, even though he had inflicted a mortal wound. In such case, I think, it would be true that the defendant was thus prevented from killing.

The case, considered under this view, is further complicated from the fact that it is impossible to determine whether deceased was induced to cut his throat through pain produced by the wound. May it not have been from remorse, or from a desire to shield his brother-in-law? In either case, the causal relation between the knife wound and the gunshot wound would seem to be the same. In either case, if defendant had not shot the deceased, the knife wound would not have been inflicted.

Suppose one assaults and wounds another, intending to take life, but the wound, though painful, is not even dangerous, and the wounded man knows that it is not mortal, and yet takes his own life to escape pain, would it not be suicide only? Yet the wound inflicted by the assailant would have the same relation to death which the original wound in this case has to the knife wound. The wound induced the suicide, but the wound was not, in the usual course of things, the cause of the suicide.

Though no case altogether like this has been found, yet, as was to have been expected, the general subject has often been considered. In 1 Hale's Pleas of the Crown, 428, the law is stated. So far as material here, his views may be thus summarized: 1. If one gives another a dangerous wound which might by very skilful treatment be cured,

and is not, it is a case of homicide. 2. If one inflicts a dangerous wound, and the man dies from the treatment, "if it can clearly appear that the medicine and not the wound was the cause of the death, it seems it is not homicide, but then it must appear clearly and certainly to be so." 3. If one receives a wound, not in itself mortal, and fever or gangrene sets in because of improper treatment or unruly conduct of the patient, and death ensues, it is homicide, "for that wound, though it was not the immediate cause of his death, yet it was the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so, consequently, is *causa causati*." 4. One who hastens the death of a person languishing with a mortal disease is guilty of a homicide, for the death is not merely by a visitation of Providence, but the hurt hastens it, and the wrongdoer cannot thus apportion the responsibility, etc. It would make no difference, I presume, if the person killed was languishing from a mortal wound, rather than from an ordinary disease.

In State *v.* Scates, 5 Jones, 420, a child was found dead, badly burned, and with a wound from a blow on the head. The burning was admitted by defendant, but the blow was not, and it was not proven who inflicted it. The medical witness thought the burning was the primary cause of death, but the blow may have hastened it. The jury was told that if it was doubtful which was the immediate cause of death, they must acquit, but if they found that the burning was the primary cause of death, and the blow only hastened it, they could convict.

The case was reversed, the appellate court holding that the blow might have been the independent act of another, and, if it hastened the death, it, and not the burning, was the cause of death.

In Bush *v.* Commonwealth, 78 Ky. 268, the deceased received a wound not necessarily mortal, and, in consequence, was taken to a hospital, where she took scarlet fever from a nurse and died of the fever. The court said: "When the disease is a consequence of the wound, although the proximate cause of the death, the person inflicting the wound is guilty, because the death can be traced as a result naturally flowing from the wound and coming in the natural order of things; but when there is a supervening cause, not naturally intervening by reason of the wound, the death is by visitation of Providence, and not from the act of the party inflicting the wound. . . . If the death was not connected with the wound in the regular chain of causes and consequences, there ought not to be any responsibility."

The last case, in my opinion, so far as it goes, correctly states the law. The facts of this case do not bring it strictly within any of the propositions found in Hale's Pleas of the Crown. The second and third propositions both predicate a wound not necessarily mortal. What the law would have been in the second case had the wound been mortal, and the applications had hastened the death, is not stated. It seems to me, however, the case of a person already languishing from a mortal

wound is precisely that of one suffering from a mortal disease. Certainly the wilful and unlawful killing of such a person would be a felony, and it cannot be true that the first offender and the last can each be guilty of murdering the same man, — if they had no connection with each other, and both wounds were not actively operating to produce death when it occurred.

But why is it that one who inflicts a wound not mortal is guilty of a homicide, if through misconduct of the patient or unskilful treatment gangrene or fever sets in, producing a fatal termination, — when, if it can be clearly made to appear that the medicine and not the wound was the cause of the death, he is not guilty of a homicide? In each case if the wound had not been, the treatment would not have been, and the man would not then have died. In each case the wound occasioned the treatment which caused or contributed to the death. The reason, I think, is found in the words advisedly used in the last sentence. In the one case the treatment caused the death, and in the other it merely contributed to it. In one case the treatment aggravated the wound, but the wound thus aggravated produced death. In the other the wound, through the occasion of the treatment, did not contribute to the death, which occurred without any present contribution to the natural effect of the medicine from the wound. Take, for instance, the giving of a dose of morphine, by mistake, sufficient to end life at once. In such case it is as obvious that the treatment produced death as it would have been had the physician cut off his patient's head. But see People *v.* Cook, 39 Mich. 236; 33 Am. Rep. 380. In this case it appears that defendant has inflicted a dangerous wound, but it was contended by the defence that death was caused by an overdose of morphine. Defendant asked an instruction as follows: "If the jury believe that the injury inflicted by the prisoner would have been fatal, but if death was actually produced by morphine poisoning, they must acquit." The instruction was refused, but the jury were told that if the wound was not in itself mortal, and death was caused solely by the morphine, they must acquit. The action of the trial court was sustained, on the ground that a mortal wound had been given which necessitated medical treatment; that the physicians were competent and acted in good faith; and that it was not made clearly to appear that the morphine solely produced death, and that the wound did not at all contribute to the death at that time. Under the authorities this was equivalent to a finding that the wound did not contribute to the death.

This case differs from that in this, that here the intervening cause, which it is alleged hastened death, was not medical treatment, designed to be helpful, and which the deceased was compelled to procure because of the wound, but was an act intended to produce death, and did not result from the first wound in the natural course of events. But we have reached the conclusion by a course of argument unnecessarily prolix, except from a desire to consider fully the earnest and able ar-

gument of the defendant, that the test is — or at least one test — whether, when the death occurred, the wound inflicted by the defendant did contribute to the event. If it did, although other independent causes also contributed, the causal relation between the unlawful acts of the defendant and the death has been made out. Here, when the throat was cut, Farrell was not merely languishing from a mortal wound. He was actually dying, — and after the throat was cut he continued to languish from both wounds. Drop by drop the life current went out from both wounds, and at the very instant of death the gunshot wound was contributing to the event. If the throat cutting had been by a third person, unconnected with the defendant, he might be guilty; for, although a man cannot be killed twice, two persons, acting independently, may contribute to his death, and each be guilty of a homicide. A person dying is still in life, and may be killed; but if he is dying from a wound given by another, both may properly be said to have contributed to his death.

SECTION V.

Interposition of an Act of a Third Party.

REGINA v. HALLIDAY.

CROWN CASE RESERVED. 1889.

[*Reported* 61 *Law Times Reports*, 701.]

CASE stated for the opinion of the Court for the Consideration of Crown Cases Reserved by the Chairman of the Court of Quarter Sessions of the County Palatine of Durham: —

At the Michaelmas Quarter Sessions 1889 of the county of Durham, the prisoner James Halliday was tried before me on an indictment charging him with having on the 19th June 1889 wilfully and maliciously inflicted grievous bodily harm on Mary Jane Halliday, and (in a second count) with having assaulted her, thereby occasioning her actual bodily harm.

It was proved that Mary Ann [Jane?] Halliday was prisoner's wife, that he had been frequently drunk during the twelve months preceding the day on which the offence was committed, that while drunk his language was very violent and abusive, that he had threatened her frequently, and that in consequence of his threats she had had to leave home and go to a neighbor's house about a week before the last-mentioned day, but he had never actually used violence towards her. On the day in question, in consequence of a request made to her by Margaret Ann Halliday (the daughter of prosecutrix and prisoner), the prosecutrix went home and found prisoner very drunk; the son of the prisoner and prosecutrix was also there, and whilst he remained prisoner was quiet, but the son left the house after a short interval and then prisoner fastened the door and windows and said to prosecutrix, "Now, you b——, I'll talk to you;" also calling her bad names and ordering

her and the daughter off to bed. Prosecutrix was in an inner room, and prisoner shortly afterwards called out to her, asking if she was in bed. Prosecutrix said she was not, whereupon prisoner exclaimed, "I'll make you so that you can't go to bed," and whilst staggering towards the inner room he knocked himself against a closet in the outer room. Prosecutrix was afraid he would blame her for that, and ran to the window, took the hasp off it and opened it in order to get out, and had got one leg out when their daughter caught hold of her and held her. Prisoner by this time had got into the room where prosecutrix was, and was within reach of her, and was calling out "Let the b—— go," whereupon the daughter left hold and prosecutrix fell into the street and broke her leg. Both mother and daughter were very frightened. Whilst prosecutrix was lying on the flags beneath, prisoner jeered at her from the window, saying it served her right, and he made no attempt to help her.

On these facts I directed the jury that, if the prosecutrix's apprehension was well grounded, taking into account the circumstances in which she was placed, and if getting out of the window was an act such as under the circumstances a woman might reasonably be led to take, they should find the prisoner guilty. The jury returned a general verdict of guilty on the whole indictment, and I sentenced him to six months imprisonment with hard labor. Defendant is in her Majesty's prison at Durham undergoing the sentence.

The question for the court is, whether or not the prisoner was rightly convicted.

No one appeared on behalf of the prisoner.

J. L. Walton (with him *Simey*), on behalf of the prosecution, submitted that the term "inflict" is convertible with the term "cause to feel," and means in sect. 20 of 24 & 25 Vict. c. 100, to be responsible for acts that cause harm to any person. That construction had been placed upon the word in sect. 18 of the Act, and a charge of felony sustained upon points very similar to those in the present case; and it had been held that the words "cause" and "inflict" were convertible terms. There was a distinction between this case and Reg. v. Martin (8 Q. B. Div. 54; 14 Cox C. C. 633). For there the persons were injured by the physical act of the prisoner, and without any act of their own, while here the jump from the window was the voluntary act of the woman. But a man did not the less cause a thing because he inflicted it; and it was clear that, if the woman had died, the prisoner could have been convicted of manslaughter, if not of murder. There were a series of authorities, commencing with Rex v. Evans (1 Russ. on Crimes, 4th ed. p. 656), as to the responsibility of a person who causes another person to take upon himself conduct which causes injury. In that case, Heath, Gibbs, and Bayley, JJ., were of opinion that, if a woman's death had been occasioned partly by her husband's blows and partly by falling from a window out of which she threw herself, yet, if she was constrained by her husband's threats of further violence, and

from a well-grounded apprehension of his doing such further violence as would endanger her life, he was answerable for the consequences of the fall as much as if he had thrown her out of the window himself. In Rex v. Hickman (5 C. & P. 151) a prisoner was held guilty of murder who had charged another person on horseback and so frightened him that he spurred his horse, and in consequence the horse fell and the man was killed. In Reg. v. Pitts (C. & Mars. 284), the prisoner was charged with the murder of a man whose body was found in a canal, there being signs of violence and a struggle on the banks of the canal, and Erskine, J., told the jury that a man might throw himself into a river under such circumstances as rendered it not a voluntary act, by reason of force either applied to the body or the mind. It was therefore immaterial whether the physical act of the prisoner operates on the body or mind, if injury is caused; and here there was ample evidence that the woman got out of the window in consequence of her husband's threats operating upon her mind so as to cause her to fear immediate danger.

Lord Coleridge, C. J. I am of opinion that the conviction in this case is correct, and that the sentence should be affirmed. The principle seems to me to be laid down quite fully in Reg. v. Martin (8 Q. B. Div. 54; 14 Cox C. C. 633). There this court held that a man who had either taken advantage of or had created a panic in a theatre, and had obstructed a passage, and rendered it difficult to get out of the theatre, in consequence of which a number of people were crushed, was answerable for the consequences of what he had done. Here the woman came by her mischief by getting out of the window — I use a vague word on purpose — and in her fall broke her leg. Now that might have been caused by an act which was done accidentally or deliberately, in which case the prisoner would not have been guilty. It appears from the case, however, that the prisoner had threatened his wife more than once, and that on this occasion he came home drunk, and used words which amounted to a threat against her life, saying "I 'll make you so that you can't go to bed;" that she, rushing to the window, got half out of the window, when she was restrained by her daughter. The prisoner threatened the daughter, who let go, and her mother fell. It is suggested to me by my learned brother that, supposing the prisoner had struck his daughter's arm without hurting her, but sufficiently to cause her to let go, and she had let her mother fall, could any one doubt but that that would be the same thing as if he had pushed her out himself? If a man creates in another man's mind an immediate sense of danger which causes such person to try to escape, and in so doing he injures himself, the person who creates such a state of mind is responsible for the injuries which result. I think that in this case there was abundant evidence that there was a sense of immediate danger in the mind of the woman caused by the acts of the prisoner, and that her injuries resulted from what such sense of danger caused her to do. I am therefore of opinion that the prisoner was rightly convicted, and that this conviction must be affirmed.

MATHEW, J. I am of the same opinion. The jury must be taken to have inferred that the act of escaping from the window and the act of the daughter were the consequences of the prisoner's acts; and I am of opinion that he is liable for the consequences of such acts.

CAVE, DAY, and SMITH, JJ., concurred.[1]

Conviction affirmed.

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GUILLE *v.* SWAN.

SUPREME COURT, NEW YORK, 1822.

[*Reported* 19 *Johns.* 381.]

IN ERROR, on *certiorari* to the Justices' Court in the City of New York. Swan sued Guille in the Justice's Court, in an action of trespass, for entering his close, and treading down his roots and vegetables, &c., in a garden in the City of New York. The facts were, that Guille ascended in a balloon in the vicinity of Swan's garden, and descended into his garden. When he descended, his body was hanging out of the car of the balloon in a very perilous situation, and he called to a person at work in Swan's field to help him, in a voice audible to the pursuing crowd. After the balloon descended, it dragged along over potatoes and radishes, about thirty feet, when Guille was taken out. The balloon was carried to a barn at the farther end of the premises. When the balloon descended, more than two hundred persons broke into Swan's garden through the fences, and came on his premises, beating down his vegetables and flowers. The damage done by Guille, with his balloon, was about fifteen dollars, but the crowd did much more. The plaintiff's damages, in all, amounted to $90. It was contended before the justice, that Guille was answerable only for the damage done by himself, and not for the damage done by the crowd. The justice was of the opinion, and so instructed the jury, that the defendant was answerable for all the damages done to the plaintiff. The jury, accordingly, found a verdict for him, for $90, on which the judgment was given, and for costs.

The cause was submitted to the court on the return, with the briefs of the counsel, stating the points and authorities.

SPENCER, C. J.[1] . . . I will not say that ascending in a balloon is

[1] Part of the opinion is omitted. — ED.

an unlawful act, for it is not so; but it is certain that the aëronaut has no control over its motion horizontally; he is at the sport of the winds, and is to descend when and how he can; his reaching the earth is a matter of hazard. He did descend on the premises of the plaintiff below, at a short distance from the place where he ascended. Now, if his descent, under such circumstances, would, ordinarily and naturally, draw a crowd of people about him, either from curiosity, or for the purpose of rescuing him from a perilous situation; all this he ought to have foreseen, and must be responsible for. Whether the crowd heard him call for help or not, is immaterial; he had put himself in a situation to invite help, and they rushed forward, impelled, perhaps, by the double motive of rendering aid and gratifying a curiosity which he had excited. Can it be doubted, that if the plaintiff in error had beckoned to the crowd to come to his assistance, that he would be liable for their trespass in entering the inclosure? I think not. In that case, they would have been co-tresspassers, and we must consider the situation in which he placed himself, voluntarily and designedly, as equivalent to a direct request to the crowd to follow him. In the present case, he did call for help, and may have been heard by the crowd; he is, therefore, undoubtedly, liable for all the injury sustained.

Judgment affirmed.

FAIRBANKS *v.* KERR.

SUPREME COURT OF PENNSYLVANIA, 1871.

[*Reported* 70 *Pa.* 87.]

AGNEW, J. Kerr & Smith, the plaintiffs below, were contractors for laying a pavement of flagstones. They laid up several piles of stones in the street along the curbstone, ready to begin work. The defendant Fairbanks got upon one of these piles, and began to make a political speech. A crowd gathered around, and some of the bystanders mounted another one of the piles, and by their weight caused several of the stones to crack and break. Kerr & Smith sued Fairbanks for this injury. There was no evidence that Fairbanks requested, or in anywise induced these bystanders to stand upon the pile, ex-

cepting so far as his speech drew them together, and they mounted the pile to hear and see more conveniently. The court below held that if the persons, whose combined weight broke down the stones, were collected together by the act of the defendant in making the speech in the street, he would be responsible in an action on the case for the consequential damages. This instruction was not qualified. The court told the jury that a proximate cause is one which is a first and direct power producing the result, and a remote cause is one removed from the direct, and may be called the secondary cause; but said nothing upon the character of the act which caused the injury, and gave no instruction to ascertain whether this act was a natural or probable consequence of making the speech in the street, or one which might have been readily foreseen by the defendant. In effect, such an unqualified instruction would expose the defendant to all the consequences of his street speech — the accidental and even the wilful acts of the bystanders gathered there by it, as well as the natural and probable consequences which he might have foreseen. Thus, if one of the crowd should by accident thrust his elbow through a window-pane, or inadvertently tread upon and break an article of show beside a door, or even if one had his pocket picked, the unfortunate speaker would be held liable for all these consequences of his speech. The court, therefore, really decided as a question of law a matter of fact properly belonging to the jury, to wit, that the mounting of the pile of stones by the bystanders was the natural and probable consequence of the speech in the street, which the defendant ought to have, or might have, foreseen. This was an error: the question was a fact dependent on all the circumstances. For example, had the second pile been two hundred feet or a square away from the speaker, no one could say that by any fair reasoning he might have expected such an accident to happen.

The maxim *causa proxima non remota spectatur* governs cases of this kind, and yet its application is not always easy. Many cases illustrate, but none define, what is an immediate or what is a remote cause. Indeed, such a cause seems to be incapable of any strict definition which will suit in every case. It was said in Morrison *v.* Davis & Co., 8 Harris, 171, the general rule is, that a man is answerable for the consequences of a fault only so far as the same are natural and proximate, and as may, on this account, be foreseen by ordinary forecast, and not for those which arise from a conjunction of his fault with other circumstances that are of an extraordinary nature. Of the first branch of this proposition, Scott *v.* Hunter, 10 Wright, 192, is an illustration. There a defendant who unnecessarily occupied the passageway to the locks of one of the dams of the Monongahela slackwater, from the afternoon of one day till the afternoon of the following day, holding the boats of the plaintiff into the stream, while it was rising rapidly, until the flood carried them over the dam, was held to be liable for the

injury. The court below thought the flood was the proximate cause of the injury, and the occupancy of the access to the locks by the defendant was too remote; but this court reversed the judgment. The question whether the defendant ought not to have apprehended the danger to the plaintiff's boats when the stream was rising rapidly was not submitted to the jury, and hence, said Mr. Justice Strong, here, we think, the court erred in assuming to decide as a matter of law that the wreck of the boats was not the natural consequence of the wrongful act of the defendant in blocking up the locks and channel of the river, and holding the boats of the plaintiff so long exposed to the force of the current. It was a *natural* consequence, he says, *if it should have been foreseen*, or if it would have been guarded against by men of ordinary prudence, using their own rights with proper regard to those of others. On the other hand, Morrison *v.* Davis & Co., *supra*, is an illutration of the second branch of the proposition. There the accident happened in consequence of the boat being overtaken and sunk by an extraordinary flood at Piper's dam, on the Juniata, but which the boat would have passed safely had it not been delayed by the defendants using a lame horse. This court held that the proximate cause destroying the boat and cargo was the flood, and that the use of the lame horse which led to the unforeseen conjunction of the happening of the flood and of the boats being at the dam at the same time, was too remote a cause to create a liability for the loss of the plaintiff's goods. Doubtless the delay produced by using the lame horse was a cause of the accident, but it was not a probable cause, for it could not be foreseen that it would unite with the flood at a place of danger to produce it. In McGrew *v.* Stone, 3 P. F. Smith, 441, it was said by myself, as the result of the cases, that the maxim *causa proxima non remota spectatur* means but this: We are not to link together, as cause and effect, events having no probable connection in the mind, and which could not, by prudent circumspection and ordinary thoughtfulness, be foreseen as likely to happen in consequence of the act in which we are engaged. It may be true that the injury would not have occurred without the concurrence of our act with the event which immediately caused the injury; but we are not justly called to suffer for it, unless the other event was the effect of our act, or was within the probable range of ordinary circumspection when engaged in the act. But when we are engaged in an act which the surrounding circumstances indicate may be dangerous to others or their interests, and when the event whose concurrence is necessary to make our act injurious, is one we can readily see may occur under the circumstances, and unite with the act to inflict an injury, we are culpable if we do not take all the care which prudent circumspection would suggest to avoid the injury.

This subject of near and remote consequences has been largely discussed by the present Chief Justice in the recent case of Pennsyl-

vania Railroad Co. *v.* Kerr, 12 P. F. Smith, 353. It is certain, he says, that in almost every considerable disaster, the result of human agency and dereliction of duty, a train of consequences generally ensues, and so ramifies as more or less to affect the whole community. Indemnity cannot reach all these results, although parties suffer who are innocent of blame. In that case the railroad company was held not to be responsible for the ulterior consequences to other houses caused by the negligent burning of a warehouse on the line of their road from the sparks of one of their engines. In Fleming *v.* Beck, 12 Wright, 313, remarks pertinent to this subject may be found. Among other things it was there said, that in strict logic it may be said that he who is the cause of loss should be answerable for all losses which flow from his causation. But in the practical workings of society the law finds in this, as in a variety of other matters, that the rule of logic is impracticable and unjust. It is impossible to compensate for all losses, and the law, therefore, aims at a just discrimination which will impose upon the party causing them the proportion that a proper view of his acts and the attending circumstances would dictate.

In view of these principles it would be difficult to decide, as a legal conclusion, that the defendant is liable for the breaking of the stones in question by the bystanders. It cannot be said with *judicial* certainty, that when he stopped to make his speech in the street he must have foreseen, as the natural and probable consequence of his act, the persons collecting together to listen to him would mount the pile of stones, and even if some of them would, that so many would as by their collected weight might break some of the stones. The lowermost stones in the pile were already trusted by the plaintiff with the weight of the uppermost. Height of pile, strength of grain, distance from the speaker, number of bystanders, and perhaps other circumstances,— all would enter into the question of the probability of injury. The question was, therefore, one of fact for the jury, and not of law for the court.

Much stress was laid in the argument on the fact that the defendant was guilty of a nuisance, by collecting a crowd, and the case of Barker *v.* The Commonwealth, 7 Harris, 412, is relied on. But, conceding that the defendant might have been indicted for a nuisance, it adds nothing to the civil injury complained of here. The question would still remain, whether the defendant's making his speech in the street was the probable and proximate cause of the injury. The nuisance and the civil injury are different things. It was not because the crowd obstructed the highway, and was therefore a nuisance, that the plaintiffs' stones were broken; but because some of the crowd mounted the pile of stones. But it cannot be conceded, in the broad sense in which it was contended, that making a speech in the street is *ipso facto* and *per se* a public nuisance. The indictment against Barker was for obstructing the streets of Pittsburg, through crowds collected by means

of violent, loud, and indecent language addressed to those passing by; and by this means collecting assemblages of men, boys, and idle, dissolute, and disorderly persons. A street may not be used, in strictness of law, for public speaking, even preaching or public worship, or a pavement before another's house may not be occupied to annoy him; but it does not follow that everyone who speaks or preaches in the street, or who happens to collect a crowd therein by other means, is therefore guilty of the indictable offense of nuisance. His act may become a nuisance by his obstruction of the public highway, but it will not do to say it is a nuisance *per se*. Such a stringent interpretation of the case of Barker is scarcely suited to the genius of our people or to the character of their institutions, and would lead to the repression of many usages of the people now tolerated as harmless, if not necessary. Those who draw crowds together in the street by window displays, music, parades, and the like, might be made answerable for many misfortunes if the doctrine of nuisance be so extensive in its consequences.

Judgment reversed, and a venire facias de novo awarded.

BEATTY v. GILLBANKS.

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QUEEN'S BENCH DIVISION. 1882.

[*Reported* 15 *Cox C. C.* 138.]

FIELD, J.[1] I am of opinion that this order cannot be supported, and must therefore be discharged. The appellants, it appears, together with a large number of other people, belong to a body of persons called the Salvation Army, who are associated together for a purpose which cannot be said to be otherwise than lawful and laudable, or at all events cannot be called unlawful, their object and intention being to induce a class of persons who have little or no knowledge of religion and no taste or disposition for religious exercises or for going to places of worship, to join them in their processions, and so to get them together to attend and take part in their religious exercises, in the hope that they may be reclaimed and drawn away from vicious and irreligious habits and courses of life, and that a kind of revival in the matter of religion

[1] The opinion of FIELD, J., only is printed. CAVE, J., delivered a concurring opinion.

may be brought about amongst those who were previously dead to any such influences. That undoubtedly is the object of the Salvation Army and of the appellants, and no other object or intention has been or can be imputed to them; and, as has been said by their learned counsel, and doubtless with perfect truth, so far are they from desiring to carry out that object by means of any force or violence, their principles are directly and entirely opposed to any conduct of that kind, or to the exercise or employment of anything like physical force; and, indeed, it appears that on the occasion in question they used no personal force or violence, but, on the contrary, when arrested by the police, they submitted quietly without the exhibition of any resistance either on their own parts or on that of any other member of their body. Such being their lawful object and intention, and having no desire or intention of using force or violence of any kind, it appeared that on this 26th day of March they assembled, as they had previously done on other occasions, in considerable numbers at their hall, and proceeded to march thence in procession through the streets of the town of Weston-super-Mare. Now that, in itself, was certainly not an unlawful thing to do, nor can such an assembly be said to be an unlawful one. Numerous instances might be mentioned of large bodies of persons assembling in much larger numbers, and marching, accompanied by banners and bands of music, through the public streets, and no one has ever doubted that such processions were perfectly lawful. Now the appellants complain that, for having so assembled as I have before stated, they have been adjudged guilty of the offence of holding an unlawful assembly, and have in consequence been ordered to find sureties to keep the peace, in the absence of any evidence of their having broken it. It was of course necessary that the justices should find that some unlawful act had been committed by the appellants in order to justify the magistrates in binding them over. The offence charged against them is "unlawfully and tumultuously assembling with others to the disturbance of the public peace, and against the peace of the Queen;" and of course, before they can be convicted upon the charge, clear proof must be adduced that the specific offence charged has been committed. Now, was that charge sustained? There is no doubt that the appellants did assemble together with other persons in great numbers, but that alone is insufficient. The assembly must be a "tumultuous assembly" and "against the peace," in order to render it an unlawful one. But there was nothing, so far as the appellants were concerned, to show that their conduct was in the least degree "tumultuous" or "against the peace." All that they did was to assemble together to walk through the town; and it is admitted by the learned counsel for the respondent, that as regards the appellants themselves, there was no disturbance of the peace, and that their conduct was quiet and peaceable. But then it is argued that, as in fact their line of conduct was the same as had on previous similar occasions led to tumultuous and riotous proceedings with stone-throwing and fighting, causing a disturbance of the

public peace and terror to the inhabitants of the town, and as on the present occasion like results would in all probability be produced, therefore the appellants, being well aware of the likelihood of such results again occurring, were guilty of the offence charged against them. Now, without doubt, as a general rule it must be taken that every person intends what are the natural and necessary consequences of his own acts; and if in the present case it had been their intention, or if it had been the natural and necessary consequence of their acts, to produce the disturbance of the peace which occurred, then the appellants would have been responsible for it, and the magistrates would have been right in binding them over to keep the peace. But the evidence as set forth in the case shows that, so far from that being the case, the acts and conduct of the appellants caused nothing of the kind, but on the contrary, that the disturbance that did take place was caused entirely by the unlawful and unjustifiable interference of the Skeleton Army, a body of persons opposed to the religious views of the appellants and the Salvation Army, and that but for the opposition and molestation offered to the Salvationists by these other persons, no disturbance of any kind would have taken place. The appellants were guilty of no offence in their passing through the streets, and why should other persons interfere with or molest them? What right had they to do so? If they were doing anything unlawful, it was for the magistrates and police, the appointed guardians of law and order, to interpose. The law relating to unlawful assemblies, as laid down in the books and the cases, affords no support to the view of the matter for which the learned counsel for the respondent was obliged to contend, viz., that persons acting lawfully are to be held responsible and punished merely because other persons are thereby induced to act unlawfully and create a disturbance. In 1 Russell on Crimes (4th edit. p. 387), an unlawful assembly is defined as follows: "An unlawful assembly, according to the common opinion, is a disturbance of the peace by persons barely assembling together with the intention to do a thing which, if it were executed, would make them rioters, but neither actually executing it nor making a motion towards the execution of it." It is clear that, according to this definition of the offence, the appellants were not guilty; for it is not pretended that they had, but, on the contrary, it is admitted that they had not, any intention to create a riot, or to commit any riotous or other unlawful act. Many examples of what are unlawful assemblies are given in Hawkins' Pleas of the Crown, book 1, cap. 28, ss. 9 and 10, in all of which the necessary circumstances of terror are present in the assembly itself, either as regards the object for which it is gathered together, or in the manner of its assembling and proceeding to carry out that object. The present case, however, differs from the cases there stated; for here the only terror that existed was caused by the unlawful resistance wilfully and designedly offered to the proceedings of the Salvation Army by an unlawful organization outside and distinct from them, called the Skeleton Army.

It was suggested by the respondent's counsel that if these Salvation processions were allowed, similar opposition would be offered to them in future, and that similar disturbances would ensue. But I cannot believe that that will be so. I hope, and I cannot but think, that when the Skeleton Army, and all other persons who are opposed to the proceedings of the Salvation Army, come to learn, as they surely will learn, that they have no possible right to interfere with or in any way to obstruct the Salvation Army in their lawful and peaceable processions, they will abstain from opposing or disturbing them. It is usual, happily, in this country for people to respect and obey the law when once declared and understood, and I hope and have no doubt that it will be so in the present case. But if it should not be so, there is no doubt that the magistrates and police, both at Weston-super-Mare and everywhere else, will understand their duty and not fail to do it efficiently, or hesitate, should the necessity arise, to deal with the Skeleton Army and other disturbers of the public peace as they did in the present instance with the appellants; for no one can doubt that the authorities are only anxious to do their duty and to prevent a disturbance of the public peace. The present decision of the justices, however, amounts to this, that a man may be punished for acting lawfully if he knows that his so doing may induce another man to act unlawfully,—a proposition without any authority whatever to support it. Under these circumstances, the questions put to us by the justices must be negatively answered, and the order appealed against be discharged.

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WISE v. DUNNING.

HIGH COURT OF JUSTICE, KING'S BENCH DIVISION. 1902.

[*Reported* 1902, 1 *K. B.* 167.]

LORD ALVERSTONE, C. J. This is a case stated by way of appeal from an order made by the stipendiary magistrate of Liverpool binding over the appellant "to be of good behaviour." The recognizance also bound him over "to keep the peace"; but the actual form of it is not material because it contained the words "to be of good behaviour." The case has been extremely well argued. I am of opinion that the magistrate was perfectly justified in putting the appellant under recognizances. It is not necessary to go at great length into the various authorities which were cited to us; I am not able to find in those authorities any statement of a rule of law which is to be applied in all such cases as this. The difficulty arises from attempts to apply the law to particular states of circumstances, for it is obvious that different people may express different opinions as to what ought to have been the application of the law under particular circumstances. For instance, our attention was called to the opinion of a very learned

lawyer and writer, Mr. Dicey, with respect to Beatty *v.* Gillbanks, 9 Q. B. D. 308, and his opinion, as I understood the passage when read, was that the view taken by the Irish courts is in conflict with that taken by Field, J., and Cave, J., in that case. But I think that, when Beatty *v.* Gillbanks, *supra*, is closely examined, it lays down no law inconsistent with anything stated by the judges in the Irish cases. For this purpose it is sufficient to cite the following passages. In Beatty *v.* Gillbanks, *supra*, FIELD, J., said, stating, I think, the law with absolute accuracy: "Now I entirely concede that every one must be taken to intend the natural consequences of his own acts, and it is clear to me that if this disturbance of the peace was the natural consequence of acts of the appellants they would be liable, and the justices would have been right in binding them over. But the evidence set forth in the case does not support this contention." O'BRIEN, C. J., in Reg. *v.* Justices of Londonderry, 28 L. R. Ir. at p. 447, said: "No act on the part of any person was proved to shew that it was reasonably probable that the conduct of the defendants would, on the day in question, have provoked a breach of the peace." It is, in my opinion, important to emphasize that enunciation of the necessary test, because it has been pressed upon us by the appellant's counsel that if the appellant did not intend to act unlawfully himself, or to induce other persons to act unlawfully, the fact that his words might have led other people so to act would not be sufficient.

In Reg. *v.* Justices of Cork, 15 Cox, C. C. 78, at p. 84, MAY, C. J., after quoting the passage from Blackstone which was read to us during the argument, proceeded: "This requisition of sureties must be understood rather as a caution against the repetition of the offence than any immediate pain or punishment. This caution is such as is intended merely for prevention without any crime actually committed by the party, but arising only from a probable suspicion that some crime is intended or likely to happen, and consequently it is not meant as any degree of punishment, unless perhaps for a man's imprudence in giving just ground for apprehension." Again, in the second case of Reg. *v.* Justices of Cork, 15 Cox, C. C. 149, reported in the same volume, FITZGERALD, J., after referring to the authorities, said, 15 Cox, C. C. at p. 155: "Without citing further authority we may assume that where it shall be made reasonably to appear to a justice of the peace that a person has incited others by acts or language to a violation of law and of right, and that there is reasonable ground to believe that the delinquent is likely to persevere in that course, such justice has authority by law, in the execution of preventive justice, to provide for the public security by requiring the individual to give securities for good behaviour, and in default commit him to prison." I have referred to those cases, not for the purpose of endeavouring to deduce from them any new rule of law, but for the purpose of pointing out that, in a number of cases and before different judges, what I may call the essential condition has been stated, substantially in the same way though in different language, that there must be an act of the defendant, the

natural consequence of which, if his act be not unlawful in itself, would be to produce an unlawful act by other persons. This case might really be put higher, but I have so far dealt with the matter assuming the facts in favour of the argument of the counsel for the appellant. I think that the local Act, to which we were referred, has a very important bearing on this case. It provides that any person who uses any threatening, or abusive, or insulting words or behaviour with intent to provoke a breach of the peace (which is not this case), or whereby a breach of the peace may be occasioned, may be summoned before the local magistrates and fined. It was contended for the appellant that the Act was only intended to prevent persons from using bad language in the streets of Liverpool with impunity. Though that may have been one of the evils which the Act aimed at, I do not think that its scope was so limited. Here we have distinct findings of facts that the appellant held a number of meetings in the public streets; that the highways were blocked by crowds numbering thousands of persons; that very serious contests and breaches of the peace had arisen, and that the appellant himself used, with respect to a large body of persons of a different religion, language which the magistrate has found to be of a most insulting character, and that the appellant challenged any one of them to get up and deny his statements. Magistrates are only doing their duty when they have regard to and make themselves acquainted with the character of the population amongst whom they have to administer justice; and, in considering the natural consequence of a man's acts who has used insulting language in the public streets towards persons of a particular religion, the magistrates are bound to take into consideration the fact that there is a large body of those persons in the town. The appellant also was proved to have stated, with respect to a meeting he intended to hold, that he had received a letter informing him that the Catholics were going to bring sticks, and he told his supporters that the police had refused to give him protection, and he said that he looked to them for protection. On these facts I think no one could reasonably doubt that the police and the magistrate were right in thinking that his language and conduct went very far indeed towards inciting people to commit, or was, at any rate, language and behaviour likely to occasion, a breach of the peace. It may be true that, if this case were to be considered with reference only to any particular one of the threats or illegalities which it is suggested the appellant has committed, further evidence would have been necessary; but in my opinion, there was abundant evidence to shew that in the public streets he had used language which had caused an obstruction, which was abusive, which did tend to bring about a breach of the peace, and that he threatened and intended to do similar acts in another place. The fact that he had promised not to hold a meeting at one place, but had held it within a quarter of a mile of that place on the same day, shews, at any rate, that the magistrate was justified in taking precautions to prevent a repetition of his previous conduct.

Further, I think that the information was sufficient to justify the magistrate in hearing the evidence, and that any omission in the language of the information, although it does allege meetings on the highway and fear of a breach of the peace, was amply cured by the evidence which was given. The magistrate heard the information; the appellant was represented by a solicitor, and elected to give no evidence. Instead of being punished, he was properly bound over to keep the peace. I am of opinion that the magistrate acted within his jurisdiction, and quite rightly; that the points of law raised on behalf of the appellant fail, and that our judgment should be for the respondent.

DARLING, J. I am of the same opinion. I think it necessary to summarize shortly the facts which were proved before the magistrate. To begin with, we have the appellant's own description of himself. He calls himself a "crusader," who is going to preach a Protestant crusade. In order to do this he supplied himself with a crucifix, which he waved about, and round his neck were hung beads — obviously designed to represent the rosaries used by Roman Catholics. Got up in this way he admittedly made use of expressions most insulting to the faith of the Roman Catholic population amongst whom he went. There had been disturbances and riots caused by this conduct of his before, and the magistrate has found that the language of the appellant was provocative, and that it was likely to occur again. Large crowds had assembled in the streets, and a serious riot was only prevented by the interference of the police. Now, what was the natural consequence of the appellant's acts? It was what has happened over and over again, what has given rise to all the cases which were cited to us, and what must be the inevitable consequence if persons, whether Protestants or Catholics, are to be allowed to outrage one another's religion as the appellant outraged the religion of the Roman Catholics of Liverpool. The kind of person which the evidence here shews the appellant to be I can best describe in the language of Butler. He is one of

> ". . . that stubborn crew
> Of errant saints, whom all men grant
> To be the true Church Militant;
> . . . .
> A sect, whose chief devotion lies
> In odd perverse antipathies." — *Hudibras*, Pt. I.

In my view, the natural consequence of those people's conduct has been to create the disturbances and riots which have so often given rise to this sort of case. Counsel for the appellant contended that the natural consequence must be taken to be the legal acts which are a consequence. I do not think so. The natural consequence of such conduct is illegality. I think that the natural consequence of this "crusader's" eloquence has been to produce illegal acts, and that from his acts and conduct circumstances have arisen which justified the magistrate in binding him over to keep the peace and be of good behaviour. In the

judgment of O'BRIEN, C. J., in Reg. *v.* Justices of Londonderry, *supra*, there is this passage: "Now I wish to make the ground of my judgment clear, and carefully to guard against being misunderstood. I am perfectly satisfied that the magistrates did not make the order which is impugned by reason of there having been, or there being likely to be, any obstruction of the highway, and that the true view of what took place is that the defendants were bound over in respect of an apprehended breach of the peace; and, in my opinion, there was no evidence to warrant that apprehension." It is clear that if there had been evidence to warrant that apprehension, the Chief Justice would have held the magistrates' decision in that case to be right. It is said that Beatty *v.* Gillbanks, *supra*, is in conflict with that decision. I am not sure that it is. I am inclined to think that, having regard to the passage which my Lord read from FIELD, J.'s, judgment in Beatty *v.* Gillbanks, *supra*, the whole question is one of fact and evidence. But I do not hesitate to say that, if there be a conflict between these two cases, I prefer the law as it is laid down in Reg. *v.* Justices of Londonderry, 28 L. R. Ir. 440. If that be a right statement of the law, as I think it is, the magistrate was perfectly justified in coming to the conclusion he did come to in this case, even without taking into consideration the question of the local Act of Parliament to which we were referred.

For these reasons I am of opinion that the magistrate's order was right.

CHANNELL, J. I am of the same opinion. I agree with the proposition for which counsel for the appellant contended — namely, that the law does not as a rule regard an illegal act as being the natural consequence of a temptation which may be held out to commit it. For instance, a person who exposes his goods outside his shop is often said to tempt people to steal them, but it cannot be said that that is the natural consequence of what he does. Again, the House of Lords has recently held that, where a blank space is left in a cheque which enables a person to increase the amount by adding figures, it is not the natural consequence that somebody should be led to commit forgery by writing figures into the cheque. The proposition is correct and really familiar; but I think the cases with respect to apprehended breaches of the peace shew that the law does regard the infirmity of human temper to the extent of considering that a breach of the peace, although an illegal act, may be the natural consequence of insulting or abusive language or conduct. Possibly this is an exception to the rule which the appellant's counsel pointed out to us; but I think it is quite clearly made out upon the cases which have been cited to us.

I therefore think that the decision of the magistrate was right.

Judgment for the Respondent.

REGINA v. MITCHELL.

CROWN CASE RESERVED. 1840.

[*Reported* 2 *Moody*, 120.]

THE prisoner Catherine Michael was tried before Mr. Baron Alderson at the Central Criminal Court in April, 1840 (Mr. Justice Littledale being present), for the wilful murder of George Michael, an infant of the age of nine months, by administering poison.

It appeared in evidence that the prisoner, on the 27th day of March last, delivered to one Sarah Stephens, with whom the child was at nurse, a quantity of laudanum, about an ounce, telling the said Sarah Stephens that it was proper medicine for the child to take, and directing her to administer to the child every night a teaspoonful thereof; that such a quantity as a teaspoonful was quite sufficient to kill a child; and that the prisoner's intention, as shown by the finding of the jury, in so delivering the laudanum and giving such directions as aforesaid, was to kill the child.

That Sarah Stephens took home with her the laudanum, and thinking the child did not require medicine had no intention of administering it. She, however, not intending to give it at all, left it on the mantelpiece of her room, which was in a different house from where the prisoner resided, she, the prisoner, then being a wet nurse to a lady; and some days afterwards, that is, on the 31st of March, a little boy of the said Sarah Stephens, of the age of five years, during the accidental absence of Sarah Stephens, who had gone from home for some hours, removed the laudanum from its place and administered to the prisoner's child a much larger dose of it than a teaspoonful, and the child died in consequence.

The jury were directed that if the prisoner delivered to Sarah Stephens the laudanum, with intent that she should administer it to the child and thereby produce its death, the quantity so directed to be administered being sufficient to cause death; and that if (the prisoner's original intention still continuing) the laudanum was afterwards administered by an unconscious agent, the death of the child under such circumstances was murder on the part of the prisoner.

They were directed that if the teaspoonful of laudanum was sufficient to produce death, the administration by the little boy of a much larger quantity would make no difference.

The jury found the prisoner guilty. The judgment was respited, that the opinion of the judges might be taken whether the facts above stated constituted an administering of the poison by the prisoner to the deceased child.

This case was considered by all the judges (except GURNEY, B., and MAULE, J.), in Easter term, 1840, and they were unanimously of opinion that the conviction was right.

REX v. McDANIEL.

CROWN CASE RESERVED. 1756.

[*Reported Leach* (4*th ed.*), 44.]

AT the Old Bailey, January Session, 1754, one Joshua Kidden was tried before Mr. Justice Foster, for robbing Mary Jones, widow, on the highway, of one guinea, a half crown, and two shillings and sixpence. The prosecutrix swore very positively to the person of the prisoner and to the circumstances of the robbery, in which she was confirmed by one Berry. The prisoner, on the evidence of these two witnesses, was convicted and executed; and on the first of March following the reward of forty pounds, given by 4 & 5 Will. and Mary, c. 8, to those who shall convict a highway robber, was divided between the prosecutrix, Mary Jones, John Berry, Stephen Macdaniel, and Thomas Cooper. The history of this prosecution lay concealed in the minds of its fabricators until the 9th of August, 1754, when the high constable of the hundred of Blackheath having taken up one Blee on suspicion of being a thief, it was discovered to have been a conspiracy and contrivance to obtain the reward.

Diligent search was accordingly made to apprehend the miscreants concerned in this extraordinary transaction; and at the Old Bailey in June Session, 1756, Stephen Macdaniel, John Berry, and Mary Jones were indicted before Mr. Justice Foster, present Mr. Baron Smythe, for the wilful murder of Joshua Kidden, in maliciously causing him to be unjustly apprehended, falsely accused, tried, convicted, and executed, well knowing him to be innocent of the fact laid to his charge, with an intent to share to themselves the reward, etc. The prisoners were convicted, upon the clearest and most satisfactory evidence, of the fact, and a scene of depravity was disclosed as horrid as it was unexampled. The judgment, however, was respited, upon a doubt whether an indictment for murder would lie in this case. The special circumstances were accordingly entered upon the record, together with an additional finding of the jury, "That Justice Hall, in the Old Bailey, is situated within the county of the city of London; and that felonies committed in the County of Middlesex have from time immemorial been accustomed to be tried there," in order that the point of law might be more fully considered upon motion in arrest of judgment. But Sir Robert Henley, the Attorney-General, declined to argue it, and the prisoners were at a subsequent session discharged from that indictment.

Sir William Blackstone, however, says that there were grounds to believe it was not given up from any apprehension that the point was not maintainable, but from other prudential reasons.[1]

[1] "The author has heard Lord Mansfield, C. J., make the same observation, and say that the opinions of several of the judges at that time, and his own, were strongly in support of the indictment." 1 East P. C., 333 *n.* — ED.

SCHOEPFLIN v. COFFEY.

COURT OF APPEALS OF NEW YORK, 1900.

[*Reported* 162 *N. Y.* 12.]

MARTIN, J. This action was for both slander and libel. The complaint contains five counts. The first and fifth are for libel and the remainder for slander. Upon the trial the court held that the complaint did not state a cause of action for slander, as the words alleged were not actionable *per se* and no special damages were averred. From this determination no appeal was taken. The case was, however, submitted to the jury as an action for the libel charged in the first and fifth counts of the complaint.

These counts in substance charge that on the fifteenth day of May, 1895, at Albany, the defendant maliciously spoke and published concerning the plaintiff the false and defamatory words following: "An indictment has been issued against Schoepflin (meaning this plaintiff) by the grand jury of Albany county in connection with Campbell's ice bill, and a warrant is out for his arrest;" "I know that an indictment has been found against Schoepflin (meaning this plaintiff) by the grand jury in connection with Campbell's ice bill, from the best authority in the world; I would gamble on it," meaning and declaring thereby that he knew the grand jury of Albany county had found an indictment against the plaintiff, who was then a member of the legislature, for corrupt and criminal conduct in connection with a bill which had been introduced and was pending in the assembly; that such statements were made in the presence of G. Edward Graham, and in the presence of G. Edward Graham and Lewis J. Seabold; and that Graham was the manager of the Associated Press at Albany, and Seabold was a reporter and news-gatherer for the New York *World*. It then averred, "and thereby defendant caused said false and defamatory statement to be printed and published in most of the daily newspapers of the state of New York and in the said New York *World*."

The first question argued was whether the complaint alleged a cause of action against the defendant for libel. It is to be observed that after stating the slanderous words which were alleged to have been spoken in the presence of Graham and Seabold, and the fact that they were reporters, the plaintiff alleges that *thereby* the defendant caused those statements to be printed and published. The complaint contains no direct allegation that the defendant caused them to be printed and published, but after stating certain premises which included the speaking of the words in the presence of the reporter and manager of the Associated Press, it is averred as a conclusion from the preceding allegations, but not as a fact, that the defendant thereby caused the statements to be printed and published. Obviously, the word "thereby" was used in the sense of by that means, or in consequence of the pre-

ceding allegations, and, hence, the averment was of a conclusion as to the effect or result of the facts previously alleged. If they were untrue, the plaintiff could not be convicted of perjury for falsely alleging and verifying an averment that the defendant caused the statements made by him to be printed and published, as he made no such allegations, but merely stated his deduction from the preceding facts. Obviously the complaint contains no sufficient allegation that the defendant caused the printing or publication of the words spoken, to constitute a cause of action against him for libel.

We have, however, searched the record in vain to find any proper objection or exception which enables the defendant upon this appeal to avail himself of the insufficiency of the complaint. To raise that question it was necessary that an objection to its sufficiency should have been taken, and the ground upon which it was claimed to be insufficient should have been brought to the attention of the court. It is not a fatal objection on appeal that the cause was tried outside the pleadings in the absence of some specific objection to that course. Parties may, if they so elect, depart from the issues made by the pleadings and try other questions relating to the merits of the controversy by consent or acquiescence. (Farmers' L. & T. Co. *v.* Housatonic R. R. Co., 152 N. Y. 251.) As the question of the sufficiency of the complaint was not properly raised in the court below, it cannot be raised here for the first time.

The next question presented is whether the proof was sufficient to justify the court in submitting to the jury the question whether the defendant caused or procured the publication of the alleged libel. In discussing this question, we shall assume that a person who requests, procures or directs another to publish a libel, or connives at or assists in its publication, is liable therefor. But to justify a jury in finding a defendant liable for such publication, there must be some evidence that it was procured by him, or that he was guilty of some affirmative act which secured or induced it. The mere speaking of words in the presence of third persons that are not actionable *per se* would at most amount to a mere slander, even if special damages were alleged, and their repetition or the printing and publication of them by the independent act of a third party, would not render the person speaking them responsible therefor.

It is too well settled to be now questioned that one who utters a slander, or prints and publishes a libel, is not responsible for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control and who thereby make themselves liable to the person injured, and that such repetition cannot be considered in law a necessary, natural and probable consequence of the original slander or libel. (Newall on Defamation, 245; Moak's Underhill on Torts, 145; M'Gregor *v.* Thwaites, 3 B. & C. 35.) The remedy in such a case would be against the party who printed and published

the words thus spoken, and not against the one speaking them, as a person is not liable for the independent illegal acts of third persons in publishing matters which may have been uttered by him, unless they are procured by him to be published, or he performed some act which induced their publication. (Ward *v.* Weeks, 7 Bing. 211; Olmsted *v.* Brown, 12 Barb. 657.) The repetition of defamatory language by another than the first publisher is not a natural consequence of the first publication, and, therefore, the loss resulting from such repetition is not generally attributable to the first publisher. This rule is based upon the principle that every person who repeats a slander is responsible for the damage caused by such repetition, and that such damage is not the proximate and natural consequence of the first publication of the slander. (Bassell *v.* Elmore, 48 N. Y. 564; Fowles *v.* Bowen, 30 N. Y. 20; Terwilliger *v.* Wands, 17 N. Y. 57, 58; Laidlaw *v.* Sage, 158 N. Y. 73.)

In the latter case the question of proximate cause was considered, and it was held that it was applicable to actions of tort, and that the proximate cause of an event was that which in a natural and continuous sequence, unbroken by any new cause, produces the event complained of, and without which it would not have occurred. Applying the principle of those cases to the question under consideration, it becomes obvious that the speaking of the words by the defendant was not the proximate cause of the injury the plaintiff sustained by reason of their publication in the various newspapers of the state. We have examined the case of Youmans *v.* Smith (153 N. Y. 214), which is so firmly relied upon by the plaintiff, but do not find any principle decided there which is in conflict with the doctrine already stated. There the person who ordered the matter printed informed the printer that he desired it for the purpose of circulation. Under those circumstances it was held that the printer was liable.

The record in this case seems to be entirely barren of proof that the defendant in any way procured, requested, commanded or induced the printing of the matters set forth in the complaint. The most that was established was that a person whom the defendant knew to be a reporter asked him as to a report which was in circulation concerning the matters alleged in the complaint, stating that he understood the defendant had asserted the facts, which were subsequently published, and the latter admitted having done so. There is, however, no proof that his statement was made for publication, but, on the contrary, the proof was that nothing was said upon the subject. There is also other evidence of the defendant which tends to show that he did not intend that it should be published and had no design to procure its publication. We are of the opinion that the court erred in denying the defendant's motion for a non-suit, and in not directing a verdict for him upon the ground that the proof was insufficient to constitute a cause of action against him for libel.[1]

[1] In the remainder of the opinion other points are discussed.— ED.

VICARS v. WILCOX.

KING'S BENCH, 1806.

[*Reported* 8 *East*, 1.]

IN an action on the case for slander the plaintiff declared, that whereas he was retained and employed by one J. O. as a journeyman for wages, the defendant knowing the premises, and maliciously intending to injure him, and to cause it to be believed by J. O. and others that the plaintiff had been guilty of unlawfully cutting the cordage of the defendant, and to prevent the plaintiff from continuing in the service and employ of J. O. and to cause him to be dismissed therefrom, and to impoverish him; in a discourse with one J. M. concerning the plaintiff and concerning certain flocking cord of the defendant alleged to have been before then cut, said that he (the defendant) had last night some flocking cord cut into six-yard lengths, but he knew who did it; for it was William Vicars; meaning that the plaintiff had unlawfully cut the said cord. And so it stated other like discourse with other third persons, imputing to the plaintiff that he had maliciously cut the defendant's cordage in his rope yard. By reason whereof the said J. O. believing the plaintiff to have been guilty of unlawfully cutting the said flocking cord, &c., discharged him from his service and employment, and has always since refused to employ him; and also one R. P. to whom the plaintiff applied to be employed after his discharge from J. O., on account of the speaking and publishing the said slanderous words, and on no other account whatsoever, refused to receive the plaintiff into his service. And by reason of the premises the plaintiff has been and still is out of employ and damnified, &c.

It appeared at the trial before Lawrence, J., at Stafford that the plaintiff had been retained by J. O. as a journeyman for a year at certain wages, and that before the expiration of the year his master had discharged him in consequence of the words spoken by the defendant. That the plaintiff afterwards applied to R. P. for employment, who refused to employ him, in consequence of the words, and because his former master had discharged him for the offense imputed to him. The plaintiff was thereupon non-suited, it being admitted that the words in themselves were not actionable without special damage, and the learned judge being of opinion that the plaintiff having been retained by his master under a contract for a certain time then unexpired, it was not competent for the master to discharge him on account of the words spoken; but it was a mere wrongful act of the master, for which he was answerable in damages to the plaintiff: that the supposed special damage was the loss of those advantages which the plaintiff was entitled to under his contract with his master; which he could not in law be considered as having lost, as he still had a right to claim them

of his master, who, without a sufficient cause, had refused to continue the plaintiff in his service. Secondly, With respect to the subsequent refusal of R. P. to employ the plaintiff, that it did not appear to be merely on account of the words spoken; but rather on account of his former master having discharged him in consequence of the accusation; without which he might not have regarded the words.

Jervis now moved to set aside the non-suit, and urged that it was always deemed sufficient proof of special damage in these cases to show that the injury arose in fact from the slander of the defendant, and it was not less a consequence of it because the act so induced was wrongful on the part of the master. He said, that he could find no case where such a distinction was laid down, and that the practice of Nisi Prius was understood to be otherwise. Secondly, That the refusal of R. P. to employ the plaintiff was clear of that objection; and that such refusal had proceeded upon the alleged cause of discharge by the first master, and not upon the bare act itself of discharge.

LORD ELLENBOROUGH, C. J., said, that the special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration: and here it was an illegal consequence: a mere wrongful act of the master; for which the defendant was no more answerable than if, in consequence of the words, other persons had afterwards assembled, and seized the plaintiff, and thrown him into a horse pond by way of punishment for his supposed transgression. And his lordship asked whether any case could be mentioned of an action of this sort sustained by proof only of an injury sustained by the tortious act of a third person. Upon the second ground, *non liquet*, that the refusal by R. P. to employ the plaintiff was in consequence of the words spoken, as it is alleged to be: there was at least a concurrent cause, the act of his former master in refusing to continue him in his employ; which was more likely to weigh with R. P. than the mere words themselves of the defendant.

The other judges concurring,

Rule refused.

QUIGLEY v. DELAWARE & HUDSON CANAL CO.

SUPREME COURT OF PENNSYLVANIA, 1891.

[*Reported* 142 *Pa.* 388.]

ON June 24, 1884, T. F. Quigley brought case against "The President and Managers and Company of the Delaware & Hudson Canal Company," to recover for damages alleged to have been occasioned by the negligence of the defendant's employees. The defendant's plea was not guilty.

At the second trial, on January 19, 1891, the following facts were shown:

On a morning in the early part of May, 1884, a team of three horses,

belonging to the plaintiff, was passing through the village of Miners Mills, upon a highway known as Market Street and also as the Mocktown Road, drawing a wagon upon which had been loaded about two tons of building stone. The horses were in charge of a driver named William Muench, in the plaintiff's employ. Market Street was intersected by the track of the Central Railroad of New Jersey, used by the defendant company. When the lead horse was about fifty feet away from the railroad crossing, Muench stopped to wait until a train of freight cars upon the crossing would pass, and while he was waiting, the plaintiff came along the street on his way to take a train. The freight train having passed, the driver looked from the top of his load and listened for any other approaching trains before starting his team again. The testimony for the plaintiff tended to show that the place at which the wagon was standing was the best point of observation for that purpose, and that, close to the railroad, the view along the track was very limited in consequence of the track being laid in a cut and on a curve. Testimony for the defendant tended to show that, at a point a little nearer to the track, an unobstructed view could have been had.

Neither seeing nor hearing anything to indicate danger, the driver started to cross the track, but after the horses had stepped upon the crossing he saw the engine of the defendant company approaching, in charge of its employees. The testimony for the plaintiff tended to show that the engine was running at the rate of over fifteen miles per hour, while witnesses for the defendant testified that its rate of speed was not more than four or five miles an hour. It was sufficiently under control, however, to be stopped about twenty feet short of the crossing. The plaintiff and Muench both testified that they heard no signal, either by bell or whistle, of the approach of the engine, although they were looking out for a train and listening for such signals. Witnesses for the defendant testified that the whistle was sounded both at the whistling post, about one thousand feet above the crossing, and also at a telegraph pole, from three hundred to four hundred feet away from it.

When the engine came in sight, the horses became frightened, and jumped forward, and the driver, believing his life in danger, dropped his lines and sprang from the wagon. The horses then ran across the track and some distance beyond it, when in some manner the lead horse was knocked down by the wheel horses and run over, his leg being broken so that he had to be killed. The plaintiff's witnesses testified that they thought it likely that the lines got caught in the wheel of the wagon and pulled the leader around, thus causing him to be knocked down, but they were unable to see exactly how the accident occurred. The driver, Muench, testified on cross-examination that he thought he might have controlled the team if he had remained on the wagon, and "if the lines would have held."

CLARK, J. In the general charge, the court instructed the jury that, inasmuch as it clearly appeared in the testimony the engineer had the locomotive in such control that he was able to stop at least twenty feet above the crossing, it could not be said, under the circumstances of this case, that he was running at a negligent rate of speed; and that, if the usual warnings had been given, the engineer would be taken to have performed his full duty in stopping the engine before he arrived at the crossing.

But the jury found that no warning had been given; that the whistle was not blown, nor the bell rung; and, whilst we think the weight of the testimony was perhaps to a different effect, the court would not have been justified in withdrawing that question from the consideration of the jury. The testimony on part of the defendant, it is true, was positive. The engineer and the fireman, and also Hopkins, testified distinctly to the fact that the whistle was blown, not only at the bridge, one thousand feet, but at the third telegraph pole, four hundred feet above the crossing. The testimony on part of the plaintiff, however, was not of a purely negative character. Quigley and Muench testify that they did not hear either the whistle or the bell until about the time the lead horse was on the crossing. They say further, however, that, as the passenger train was about due, they were giving particular attention, were listening for the whistle, and that if it had been blown they would have heard it. Under these circumstances, their testimony is more than merely negative, and therefore could not be disregarded. The jury has found the fact, and that this failure to give proper warning, as the engine approached the crossing, was an act of negligence on the part of the engineer which is to be imputed to the company.

The jury has also found, upon competent testimony and under proper instructions, that the driver of the wagon, before attempting to cross the railroad track, stopped at a proper place, and looked and listened for the approach of a train, and did not hear the engine; and that having started and driven upon the track, when he saw the engine approaching as it did, he acted as an ordinarily prudent man would have acted, in view of all the circumstances, in jumping off the wagon to avoid the peril which seemed imminent, and in abandoning the horses and wagon to the probable consequences. The verdict of the jury involves the fact that the driver was not guilty of any negligence which contributed to the injury. Assuming this to be so, what was the proximate cause of the injury? The purpose of giving a warning before a railroad train or locomotive engine comes to a crossing, as the learned judge very properly said in the general charge, is not only to prevent persons from driving on the track in front of the approaching train or engine, but also to give notice to travelers upon the highway, so that they may not approach within dangerous proximity to the train. The alleged neglect of this duty caused the driver of this wagon to go upon the

track, and into the peril to which he was there seemingly exposed. The dropping of the lines and the leap from the wagon, according to the finding of the jury, were such acts as an ordinarily prudent person would have done to extricate himself from the threatened danger; and they may therefore be said to have been necessitated by the negligent conduct of the company. It was the fright of the horses, and their abandonment by the driver, that caused the injury; but these causes were produced by the negligence of the defendant, who, without warning, ran the engine into such dangerous proximity to the wagon as to produce this fright of the horses, and to oblige the defendant, who felt that he was in peril, to jump from the wagon and let the horses go without control.

It might not, perhaps, have been foreseen exactly how, or to what extent, injury would result; but the engineer, as we said in Bunting *v.* Hogsett, 139 Pa. 363, would be held to have foreseen whatever consequences might ensue from his negligence without the intervention of some other independent agency; and both his employer and himself would be held for what might in the nature of things occur in consequence of that negligence, although in advance the actual result might have seemed improbable. It is not certainly known that the lines were caught in the wheel. The witnesses say that it is "likely" they did; we do know that they were liable to be caught in the wheels, and this would account for the lead horse having been turned around as he was. If the engineer, by his negligence, compelled the driver to abandon the horses, he would be presumed to have foreseen what was reasonably liable to occur. There was not any intervening cause, disconnected with the primary fault, and self-operating, shown to exist in this case, to affect the question of the defendant's liability. The negligent act of the engineer was the natural, primary, and proximate cause of the injury.

The judgment is affirmed.

CHAMBERS *v.* CARROLL.

SUPREME COURT OF PENNSYLVANIA, 1901.

[*Reported* 199 *Pa.* 371.]

FELL, J. The facts on which the question to be considered arises may be briefly stated. William Chambers, a boy twelve years old, was seated on a log one foot in diameter and four feet long, which was on a vacant lot, close to the end of a frame shop that fronted on Haverford Avenue, about midway between 59th and 60th Streets. The shop was eight feet from the curb, and the space between it and 59th Street was open. A companion named Kennedy sat on a piece of board between Chambers and the avenue. A horse and cart owned by the defendants, and in charge of their driver, were suddenly turned

from the avenue, and without warning crossed the curb and the footwalk to the vacant lot. The horse was driven so rapidly that the boys did not see him until he was almost on them, and he passed so near the end of the shop as not to leave room for them to sit or, probably, to stand between it and the wheel of the cart, the distance from the building to the wheel according to the estimates of the witnesses being from one to four feet. Kennedy first saw the danger, and sprang up and ran by Chambers, calling to him to get out of the way. Kennedy escaped without injury. Chambers, in his attempt to escape, was pushed or struck by the log, and fell under the wheel, which passed over his leg. What caused the log to move did not clearly appear. He testified that when he heard the call, the horse was within a few inches of him, and when he went to get up, the log hit his leg and knocked him down; that he did not know what moved the log, but thought that Kennedy must have kicked it as he ran. Kennedy testified that he did not touch the log. There was testimony that earth had been banked up against the end of the shop to the height of over a foot, making an incline at the place where the log lay. The curb was eight inches high, and carts had not before crossed it at this place, but had entered the lot at a point on the other side of the shop near 60th Street.

The testimony made out a *prima facie* case of negligence on the part of the driver, who without warning turned from the street and drove on the lot where the boys were seated and were in plain view after he reached 59th Street. The learned trial judge regarded the case as a close one, but entered a non-suit on the ground that the plaintiff was thrown or forced under the wheel by the movement of the log; and whether its movement was caused by Kennedy's striking it or by the plaintiff in his effort to escape, the cause of the accident was not one for which the defendant was liable. This, we think, is not the correct view.

The wrongful act of the driver was the direct and proximate cause of the plaintiff's injury. It placed him in a position of imminent peril, where he would have been run over if he had sat still, and where his only means of escape was to run at the side of the horse and in front of the wheel until he passed the shop. If the log had been in his way, and he had fallen over it, or if it had not been there at all, and he had tripped and fallen from some other cause as he ran, his fall, while resulting in his injury by preventing his escape, would not have been its dominant cause, but only an incident of it. The result is the same if the movement of the log forced him under the wheel, and whether its movement was caused by Kennedy in striking it as he passed or by the plaintiff in rising from it, either act would be an accidental one resulting from the alarm and the necessity for hasty action caused by the negligent act of the driver, and neither would relieve the defendant of responsibility. In no sense was the rolling of the log an

independent intervening cause which interrupted the natural sequence of events and broke the chain of responsibility. It did not inflict the injury, but only retarded the plaintiff's movements and prevented his escape. Had it inflicted the injury, it would not have been the responsible cause, for it would have been an intervening cause set in motion by the negligent act of the driver. Moreover it would have been an innocent cause, and between an innocent and a culpable cause the latter will be held to be the proximate and legally responsible cause. In Pittsburg *v.* Grier, 22 Pa. 54, piles of pig iron had been negligently left on a wharf near the low watermark; when the river rose, a steamboat, in order to avoid injury by the iron, was backed into the stream, where it was injured by a floating object. It was said in the opinion: "But a cause is not too remote to be looked to because it produced the danger by means of an intermediate agency; when the injury was the immediate consequence of some peril to which the suffering party was obliged to expose himself in order to avoid the one for which he sues, it is proximate enough."[1]

The judgment is reversed with a procedendo.

JOHNSON *v.* NORTHWESTERN TELEPHONE EXCHANGE CO.

SUPREME COURT OF MINNESOTA, 1892.

[*Reported* 48 *Minn.* 433.]

GILFILLAN, C. J. Action for an injury caused by the falling in a street in Minneapolis of one of the poles of the defendant, on which were suspended its line wires, which fall was, as is alleged, due to the rotten and unsound condition of the pole (permitted to be so by defendant's negligence) rendering it of insufficient strength to bear the weight of the wires suspended upon it. At the close of the evidence the court below directed a verdict for the defendant. Upon an examination of the evidence we can see no reason for the direction (and none is suggested by the respondent) except the assumption that there intervened between the negligence of the defendant, if any there was, and the injury to plaintiff, an independent, adequate cause of the injury, to wit, the act of a third person, which was what in law is termed the "proximate cause of the injury." From the evidence the jury might have found these facts: First, that through the negligence of the defendant the pole was of insufficient strength to bear the strain produced by the weight of wire suspended on it, so that it was in danger of falling, carrying the wires down with it, and injuring per-

[1] See also Thatcher *v.* Central Traction Co., 166 Pa. 65, 30 Atl. 1048; Jackson *v.* Galveston H. & S. A. Ry., 90 Tex. 373, 38 S. W. 745; Missouri K. & T. Ry. *v.* Harrison (Tex. Civ. App.), 120 S. W. 254. — ED.

sons passing along the street; second, that, for the purpose of sustaining it and preventing it falling, the defendant had, with the license of one Shadewald, extended guy wires from the top of the pole to the building of Shadewald, to which the other ends of the guy wires were fastened, which served to stay the pole upright and prevent it falling; third, that a reasonable time before the fall of the pole, to enable defendant to make the pole safe, Shadewald revoked the license, and required the removal of the guy wires from his building; fourth, the defendant failing to remove the guy wires, Shadewald cut them at the ends attached to his building, and the pole, deprived of the stay afforded by them, broke off near the ground and fell in the street, injuring plaintiff; fifth, that after the revocation of the license defendant did not adopt any means to render the pole safe, in lieu of the stay of the guy wires. Had the jury, as they might have done, found these to be the facts, then the negligence of the defendant would have been shown to be a proximate cause of the injury. Upon the revocation of the license Shadewald had the right, as to defendant, certainly after allowing it a reasonable time in which to take other means to make the pole safe, to remove or cut the guy wires. As soon as the license was withdrawn it was the duty of defendant to make the pole safe, and, if it required something besides its own strength to make it so, it was its duty to provide something. Its omission to do so would be negligence. Had Shadewald refused to give the license in the first instance, that would have been no excuse for failure to have the pole safe. His withdrawal of the license left defendant in the same situation it would have been in had he withheld it in the first instance — its duty no way different. The jury might, from the evidence, have found that, had the defendant done its duty in this respect, the pole would not have fallen with the wires cut. As one may be liable for doing a rightful thing in a negligent manner, it may be that Shadewald was also liable for the injury. If the pole was likely to fall with the wires cut, then it might be negligence toward those passing in the street to cut them without warning. But that his negligence contributed to the injury does not absolve the defendant. Suppose the jury had found, as the evidence would have justified, that but for the cutting of the wires the pole would not have fallen, and that it would not have fallen with the wires cut, but for the neglect of the defendant, after the license was revoked, to make the pole safe — in other words, that it was the coöperation of defendant's negligence and Shadewald's act that produced the injury — then it would be a case of concurring negligence, in which case each party guilty of negligence is liable for the result. The negligence of each is a proximate cause, where the injury would not have occurred but for that negligence.

Order reversed.[1]

Mitchell, J., took no part in the decision.

[1] See also Evans v. Chicago & N. W. Ry., 109 Minn. 64. — Ed.

BENTLEY v. FISHER LUMBER & MANUFACTURING CO.

SUPREME COURT OF LOUISIANA, 1899.

[*Reported* 51 *La. Ann.* 451.]

MILLER, J. The plaintiff appeals from a judgment awarding her only part of the damages she claims to have sustained by the building of a levee on her land by the defendants.[1] . . . Obstructing a natural outlet for the lands of others besides plaintiff's the levee proved a source of discontent to the landowners in the vicinity; and the result was that a number of men assembled, and cut the levee, causing the confined water to escape on plaintiff's cultivated lands, below or south of it, destroying her crop, unfitting the land for the production of the full crop it would have yielded but for the precipitation of the water on the land at a time too far advanced in the season to admit of successful replanting. . . .

The claim for damages in respect to the land below or south of the levee encounters the difficulty that the inundation causing the alleged loss of crops was the result of the act of the mob cutting the levee. In this view, it was not the levee that caused the damage; for, while the levee stood, there could be no flooding of the land. Can the defendants be held for the violence of the mob that precipitated the water on the land? The law is clear that in suits of this character, in computing actual damages, the proximate cause is that which the law regards. When the law awards other damages than those attributable to the proximate cause, they are given as punitory. Sedg. Dam., § 58, *et seq.*; 2 Greenl. Ev., § 256. We have given attention to the line of authority cited by plaintiff to connect the act of the defendant in building the levee with the subsequent violence of the mob cutting it. The "Squib" Case is found in the text-books to illustrate the rule that distinguishes the remote from the proximate cause. The squib is thrown in the market house, lights on one stall, then on another, from both of which it is thrown, and finally the squib thus thrown from the last stall enters the plaintiff's eye and destroys his sight. The court attributed the plaintiff's injury to the party who first threw the squib; in other words, his act was deemed the proximate cause of the loss. The text-books call attention to the concurrence to the full extent of the decision of but one of the four judges, and to the dissent of Justice Blackstone. Sedg. Meas. Dam., p. 58, note. This type of cases, cited in support of plaintiff's demand, does not, in our view, support it. The hurling of the squib in the case cited, the wrongful act, is the effective and direct cause of the loss of the plaintiff's eye. In the case

[1] Part of the opinion is omitted. — ED.

before us the levee built by defendant was harmless, in respect to plaintiff's loss. The act of the mob was the direct cause of that loss. Our law, and the general law in this class of cases, restricts damages, unless given by way of punishment, to the loss arising from the proximate cause. Gaulden *v.* McPhaul, 4 La. Ann. 79; Grant *v.* McDonogh, 7 La. Ann. 448. With the most patient consideration on this part of the case, we reach the conclusion of our learned brother of the district court, that the plaintiff's demand in this respect cannot be sustained.

SCOTT *v.* SHEPHERD.

COMMON PLEAS, 1773.

[*Reported* 2 *Wm. Bl.* 892.]

TRESPASS and assault for throwing, casting, and tossing a lighted squib at and against the plaintiff, and striking him therewith on the face, and so burning one of his eyes, that he lost the sight of it, whereby, &c. On not guilty pleaded, the cause came on to be tried before Nares, J., last summer assizes, at Bridgewater, when the jury found a verdict for the plaintiff with 100*l.* damages, subject to the opinion of the court on this case: — On the evening of the fair-day at Milborne Port 28th October, 1770, the defendant threw a lighted squib, made of gun powder, &c., from the street into the market-house, which is a covered building, supported by arches, and inclosed at one end, but open at the other and both the sides, where a large concourse of people were assembled; which lighted squib, so thrown by the defendant, fell upon the standing of one Yates, who sold gingerbread, &c. That one Willis instantly, and to prevent injury to himself and the said wares of the said Yates, took up the said lighted squib from off the said standing, and then threw it across the said market-house, when it fell upon another standing there of one Ryal, who sold the same sort of wares, who instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing, and then threw it to another part of the said market-house, and, in so throwing it, struck the plaintiff then in the said market-house in the face therewith, and the combustible matter then bursting, put out one of the plaintiff's eyes. Qu. If this action be maintainable?

This case was argued last term by *Glyn*, for the plaintiff, and *Burland* for the defendant: and this term, the court, being divided in their judgment, delivered their opinions *seriatim*.

NARES, J., was of the opinion, that trespass would well lie in the present case. That the natural and probable consequence of the act done by the defendant was injury to somebody, and therefore the

act was illegal at common law. And the throwing of squibs has by statute W. 3, been since made a nuisance. Being therefore unlawful, the defendant was liable to answer for the consequences, be the injury *mediate* or *immediate*. 21 Hen. 7, 28, is express that *malus animus* is not necessary to constitute a trespass. So, too, 1 Stra. 596; Hob. 134; T. Jones, 205; 6 Edw. 4, 7, 8; Fitzh. Trespass, 110. The principle I go upon is what is laid down in Reynolds and Clark, Stra. 634, that if the act in the first instance be unlawful, trespass will lie. Wherever therefore an act is unlawful at first, trespass will lie for the consequences of it. So, in 12 Hen. 4, trespass lay for stopping a sewer with earth, so as to overflow the plaintiff's land. In 26 Hen. 8, 8 for going upon the plaintiff's land to take the boughs off which had fallen thereon in lopping. See also Hardr. 60; Reg. 108, 95; 6 Edw. 4, 7, 8; 1 Ld. Raym. 272; Hob. 180; Cro. Jac. 122, 43; F. N. D. 202, [91, G]. I do not think it necessary, to maintain trespass, that the defendant should personally touch the plaintiff; if he does it by a mean it is sufficient. — *Qui facit per aliud facit per se.* He is the person, who, in the present case, gave the mischievous faculty to the squib. That mischievous faculty remained in it till the explosion. No new power of doing mischief was communicated to it by Willis or Ryal. It is like the case of a mad ox turned loose in a crowd. The person who turns him loose is answerable in trespass for whatever mischief he may do. The intermediate acts of Willis and Ryal will not purge the original tort in the defendant. But he who does the first wrong is answerable for all the consequential damages. So held in the King and Huggins, 2 Lord Raym. 1574; Parkhurst and Foster, 1 Lord Raym. 480; Rosewell and Prior, 12 Mod. 639. And it was declared by this court, in Slater and Baker, M. 8 Geo. 3, 2 Wils. 359, that they would not look with eagle's eyes to see whether the evidence applies exactly or not to the case: but if the plaintiff has obtained a verdict for such damages as he deserves, they will establish it if possible.

BLACKSTONE, J., was of opinion, that an action of trespass did not lie for Scott against Shepherd upon this case. He took the settled distinction to be, that where the injury is immediate, an action of trespass will lie; where it is only consequential, it must be an action on the case: Reynolds and Clarke, Lord Raym. 1401, Stra. 634; Haward and Bankes, Burr. 1114; Harker and Birkbeck, Burr. 1559. The lawfulness or unlawfulness of the original act is not the criterion; though something of that sort is put into Lord Raymond's mouth in Stra. 635, where it can only mean, that if the act then in question, of erecting a spout, had been in itself unlawful, trespass might have lain; but as it was a lawful act, (upon the defendant's own ground), and the injury to the plaintiff only consequential, it must be an action on the case. But this cannot be the general rule; for it is held by the court in the same case, that if I throw a log of timber into the highway, (which

is an unlawful act), and another man tumbles over it, and is hurt, an action on the case only lies, it being a consequential damage; but if in throwing it I hit another man, he may bring trespass, because it is an immediate wrong. Trespass may sometimes lie for the consequences of a lawful act. If in lopping my own trees a bough accidentally falls on my neighbor's ground, and I go thereon to fetch it, trespass lies. This is the case cited from 6 Edw. 4, 7. But then the entry is of itself an immediate wrong. And case will sometimes lie for the consequence of an unlawful act. If by false imprisonment I have a special damage, as if I forfeit my recognizance thereby, I shall have an action on the case; per Powel, J., 11 Mod. 180. Yet here the original act was unlawful, and in the nature of trespass. So that lawful or unlawful is quite out of the case; and the solid distinction is between direct or immediate injuries on the one hand, and mediate or consequential on the other. And trespass never lay for the latter. If this be so, the only question will be, whether the injury which the plaintiff suffered was immediate, or consequential only; and I hold it to be the latter. The original act was, as against Yates, a trespass; not as against Ryal, or Scott. The tortious act was complete when the squib lay at rest upon Yates's stall. He, or any bystander, had, I allow, a right to protect themselves by removing the squib, but should have taken care to do it in such a manner as not to endamage others. But Shepherd, I think, is not answerable in an action of trespass and assault for the mischief done by the squib in the new motion impressed upon it, and the new direction given it, by either Willis or Ryal; who both were free agents, and acted upon their own judgment. This differs it from the cases put of turning loose a wild beast or a madman. They are only instruments in the hand of the first agent. Nor is it like diverting the course of an enraged ox, or of a stone thrown, or an arrow glancing against a tree; because there the original motion, the *vis impressa*, is continued, though diverted. Here the instrument of mischief was at rest, till a new impetus and a new direction are given it, not once only, but by two successive rational agents. But it is said that the act is not complete, nor the squib at rest, till after it is spent or exploded. It certainly has a power of doing fresh mischief, and so has a stone that has been thrown against my windows, and now lies still. Yet if any person gives that stone a new motion, and does farther mischief with it, trespass will not lie for that against the original thrower. No doubt but Yates may maintain trespass against Shepherd. And, according to the doctrine contended for, so may Ryal and Scott. Three actions for one single act! nay, it may be extended *in infinitum*. If a man tosses a football into the street, and, after being kicked about by one hundred people, it at last breaks a tradesman's windows; shall he have trespass against the man who first produced it? Surely only against the man who gave it that michievous direction. But it is said, if Scott has no action against Shepherd, against whom must he

seek his remedy? I give no opinion whether case would lie against Shepherd for the consequential damage; though, as at present advised, I think, upon the circumstances, it would. But I think, in strictness of law, trespass would lie against Ryal, the immediate actor in this unhappy business. Both he and Willis have exceeded the bounds of self-defense, and not used sufficient circumspection in removing the danger from themselves. The throwing it across the market-house, instead of brushing it down, or throwing [it] out of the open sides into the street, (if it was not meant to continue the sport, as it is called), was at least an unnecessary and incautious act. Not even menaces from others are sufficient to justify a trespass against a third person; much less a fear of danger to either his goods or his person;— nothing but inevitable necessity; Weaver and Ward, Hob. 134; Dickenson and Watson, T. Jones, 205; Gilbert and Stone, Al. 35, Styl. 72. So in the case put by Brian, J., and assented to by Littleton and Choke, C. J., and relied on in Raym. 467,—"If a man assaults me, so that I cannot avoid him, and I lift up my staff to defend myself, and, in lifting it up, undesignedly hit another who is behind me, an action lies by that person against me; and yet I did a lawful act in endeavouring to defend myself." But none of these great lawyers ever thought that trespass would lie, by the person struck, against him who first assaulted the striker. The cases cited from the Register and Hardres are all of immediate acts, or the direct and inevitable effects of the defendants' immediate acts. And I admit that the defendant is answerable in trespass for all the direct and inevitable effects caused by his own immediate act.—But what is his own immediate act? The throwing the squib to Yates's stall. Had Yates's goods been burnt, or his person injured, Shepherd must have been responsible in trespass. But he is not responsible for the acts of other men. The subsequent throwing across the market-house by Willis, is neither the act of Shepherd, nor the inevitable effect of it; much less the subsequent throwing by Ryal. Slater and Barker was first a motion for a new trial after verdict. In our case the verdict is suspended till the determination of the court. And though after verdict the court will not look with eagle's eyes to spy out a variance, yet, when a question is put by the jury upon such a variance, and it is made the very point of the cause, the court will not wink against the light, and say that evidence, which at most is only applicable to an action on the case, will maintain an action of trespass. 2. It was an action on the case that was brought, and the court held the special case laid to be fully proved. So that the present question could not arise upon that action. 3. The same evidence that will maintain trespass, may also frequently maintain case, but not *e converso*. Every action of trespass with a *per quod* includes an action on the case. I may bring trespass for the immediate injury, and subjoin a *per quod* for the consequential damages;—or may bring case for the consequential damages, and pass over the immediate injury, as in

the case from 11 Mod. 180, before cited. But if I bring trespass for an immediate injury, and prove at most only a consequential damage, judgment must be for the defendant; Gates and Bailey, Tr. 6 Geo. 3, (2 Wils. 313). It is said by Lord Raymond, and very justly, in Reynolds and Clarke, "We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion." As I therefore think no immediate injury passed from the defendant to the plaintiff, (and without such immediate injury no action of trespass can be maintained), I am of opinion, that in this action judgment ought to be for the defendant.

GOULD, J., was of the same opinion with NARES, J., that this action was well maintainable. — The whole difficulty lies in the form of the action, and not in the substance of the remedy. The line is very nice between case and trespass upon these occasions: I am persuaded there are many instances wherein both or either will lie. I agree with Brother NARES, that wherever a man does an unlawful act, he is answerable for all the consequences; and trespass will lie against him, if the consequence be in nature of trespass. But, exclusive of this, I think the defendant may be considered in the same view as if he himself had personally thrown the squib in the plaintiff's face. The terror impressed upon Willis and Ryal excited self-defense, and deprived them of the power of recollection. What they did was therefore the inevitable consequence of the defendant's unlawful act. Had the squib been thrown into a coach full of company, the person throwing it out again would not have been answerable for the consequences. What Willis and Ryal did, was by necessity, and the defendant imposed that necessity upon them. As to the case of the football, I think that if all the people assembled act in concert, they are all trespassers; 1. from the general mischievous intent; 2. from the obvious and natural consequences of such an act: which reasoning will equally apply to the case before us. And that actions of trespass will lie for the mischievous consequences of another's act, whether lawful or unlawful, appears from their being maintained for acts done in the plaintiff's own land: Hardr. 60; Courtney and Collet, 1 Lord Raym. 272. I shall not go over again the ground which Brother NARES has relied on and explained, but concur in his opinion, that this action is supported by the evidence.

DE GREY, C. J. This case is one of those wherein the line drawn by the law between actions on the case and actions of trespass is very nice and delicate. Trespass is an injury accompanied with force, for which an action of trespass *vi et armis* lies against the person from whom it is received. The question here is, whether the injury received by the plaintiff arises from the force of the original act of the defendant, or from a new force by a third person. I agree with my Brother BLACKSTONE as to the principles he has laid down, but not in his application of those principles to the present case. The real question certainly does not turn upon the lawfulness or unlawfulness of the

original act; for actions of trespass will lie for legal acts when they become trespasses by accident; as in the cases cited of cutting thorns, lopping of a tree, shooting at a mark, defending oneself by a stick which strikes another behind, &c. —They may also not lie for the consequences even of illegal acts, as that of casting a log in the highway, &c.— But the true question is, whether the injury is the direct and immediate act of the defendant; and I am of opinion, that in this case it is. The throwing the squib was an act unlawful and tending to affright the bystanders. So far, mischief was originally intended; not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief therefore follows, he is the author of it; — *Egreditur personam*, as the phrase is in criminal cases. And though criminal cases are no rule for civil ones, yet in trespass I think there is an analogy. Everyone who does an unlawful act is considered as the doer of all that follows; if done with a deliberate intent, the consequence may amount to murder; if incautiously, to manslaughter; Fost. 261. So too, in 1 Ventr. 295, a person breaking a horse in Lincoln's Inn Fields hurt a man; held, that trespass lay; and 2 Lev. 172, that it need not be laid *scienter*. I look upon all that was done subsequent to the original throwing as a continuation of the first force and first act, which will continue till the squib was spent by bursting. And I think that any innocent person removing the danger from himself to another is justifiable; the blame lights upon the first thrower. The new direction and new force flow out of the first force, and are not a new trespass. The writ in the Register, 95a, for trespass in maliciously cutting down a head of water, which thereupon flowed down to and overwhelmed another's pond, shows that the immediate act need not be instantaneous, but that a chain of effects together will be sufficient. It has been urged, that the intervention of a free agent will make a difference: but I do not consider Willis and Ryal as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation. On these reasons I concur with Brothers GOULD and NARES that the present action is maintainable.

Postea to the plaintiff.

RICKER *v.* FREEMAN.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE, 1870.

[*Reported* 50 *N. H.* 420.]

PLAINTIFF'S testimony tended to show, that in the afternoon of the aforesaid day he went alone to school, and as he came into the schoolhouse yard he saw the defendant standing in the entry, looking out

from the north side of the entry door, and that he dodged back out of sight, and as plaintiff stepped into the door, the defendant caught him by the right arm or wrist, with both of his hands, and swung him violently round two or three time. "This made me dizzy. He let me go, and I passed off in a northeasterly direction and came violently against the Townsend boy, and Townsend pushed me off. When defendant was whirling me round, sometimes my feet were not on the floor, and sometimes they were. When Townsend pushed me off, I went against the hat hook."[1]

FOSTER, J.[2] . . . The more important inquiry relates to the charge and instructions of the court to the jury.

They were directed to inquire who was the first actor or the procuring cause of the injury to the plaintiff. They were told that the defendant would be liable if the wrongful force which he gave the plaintiff carried him on to the hook, or if such force, combined with the new force given to him by Townsend, produced the result. But if they should find that the injury received by the plaintiff resulted entirely from the push of Townsend alone, unassisted by the act of the defendant, then he would not be liable; or, in other words, if the original force given to the plaintiff by the defendant had ceased, or time was given to Townsend for reflection or deliberation before he gave his push, then the defendant would not be liable. The jury would determine whether the force originally commenced by the defendant did at any time cease, and whether it was not directly continued up to the time the plaintiff struck the hook, by the direct agency of the defendant, Townsend lending his aid wittingly or unwittingly to the injury; or whether Townsend, by pushing him from his person, did more than to act in self-defense, and was not justified under the circumstances in order to save his person and himself from present danger. The jury would determine also whether, from the time the plaintiff was first seized by the defendant and until the injury was done, he could exercise any self-control over his own person, or could in any way have prevented what happened to him.

The substance of these instructions, so far as the defendant's exceptions render them material to this inquiry, is, that if the force or impetus given to the plaintiff by the defendant, when he seized, whirled, and slung him away, continued in operation, either alone or in combination with the force or impetus, if any, communicated by Townsend, until this force or impetus impaled the plaintiff upon the hook, and so the defendant, either solely or in conjunction with Townsend, inflicted the injury, such injury was the direct and proximate result of the defendant's original wrongful act, and he must be answerable for the consequences.

It is quite clear that but for the defendant's wrongful act, the plain-

[1] Part of the evidence is omitted. — ED.

[2] Part of the opinion, discussing the form of action, is omitted. — ED.

tiff would have sustained no injury. It is equally clear that, under the instructions of the court, the jury must have found, in order to charge the defendant, that the original force or impetus given to the plaintiff had not ceased, and that time was not given Townsend for reflection or deliberation before he pushed the plaintiff off, and that Townsend, either in self-defense or in obedience to an uncontrollable impulse and instinct, became the involuntary means of continuing the original force and impetus which cast the plaintiff upon the hook. They must also have found that, after the first assault by the defendant, the plaintiff was incapable of exercising self-control or preventing the result.

We have seen that malice is not essential to the maintenance of trespass for an assault, but that the action is supported by a negligent act and pure accident, if the negligent or accidental act is also a wrongful act. And we think the principle is clearly established, that negligence may be regarded as the proximate cause of an injury, of which it may not be the sole nor the immediate cause. If the defendant's negligent, inconsiderate, and wanton, though not malicious act, concurred with any other thing, person, or event, other than the plaintiff's own fault, to produce the injury, so that it clearly appears that but for such negligent, wrongful act, the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible, even though his negligent, wrongful act may not have been the nearest cause in the chain of events or the order of time. Shearman & Redfield on Negligence, § 10, and cases cited in note.

In trespass for an assault, it cannot be essential that the defendant should personally touch the plaintiff; if he does it by some intermediate agency, it is sufficient. The intermediate concurring act will not purge the original tort, nor take assignment of the responsibility.

In Jordan *v.* Wyatt, 4 Grattan, 151, Baldwin, J., says: "The terms 'immediate' and 'consequential' should, as I conceive, be understood, not in reference to the time which the act occupies, or the space through which it passes, or the place from which it is begun, or the intention with which it is done, or the instrument or agent employed, or the lawfulness or unlawfulness of the act, but in reference to the progress and termination of the act — to its being done on the one hand, and its having been done on the other. If the injury is inflicted by the act at any moment of its progress from the commencement to the termination thereof, then the injury is direct or immediate; but if it arises after the act has been completed, though occasioned by the act, then it is consequential or collateral, or, more exactly, a collateral consequence."

The defendant objects particularly to that part of the charge in which the jury were told that "if the original force given by Freeman had ceased, or time was given Townsend for reflection or deliberation before he gave the push, then Freeman would not be liable." And he

contends that, under these instructions, the jury must have found, either that Townsend's force combined with the original impetus given by the defendant, or that Townsend did not have time for reflection and deliberation before he gave the push; that the jury might have decided the case upon the latter consideration, which, he says, would be wrong, because Townsend was bound to reflect and deliberate. The force projected by the defendant having ceased, as he contends, the new force given by Townsend was original, because not demanded for the self-defense of Townsend; that the plaintiff, not being a dangerous missile or instrument, like the famous squib in Scott *v.* Shepherd, Townsend had no right to push him off; and if he did so, to the plaintiff's injury, the result cannot be considered the proximate or immediate act of the defendant, and so he is not answerable.

If it be suggested that human nature instinctively repels the forcible contact of a person or thing thrown or falling against a person, the defendant replies that the person thus assailed must control that impulse, and must take time for reflection and deliberation before he can act; or, at any rate, if he does not, the projector of the original force is exonerated, because the original force has ceased and stopped. We think this proposition is altogether too refined.

A man instinctively repels violent contact with a foreign and external substance. He can no more control the impulse to ward off and repel a sudden and unlooked for blow, than an unreasoning, inanimate, but elastic substance can control, by superior power of gravity, the natural repulsion and rebound of the thing thrown or falling violently upon or against it; and it can hardly be said that the original force has ceased or stopped at all, during the inconceivably sharp point of time interposed between the contact and the repulsion of a blow striking an inanimate elastic object, or an object animate, sentient, but also involuntarily repellant.

The substance of the charge in this particular was, that if Townsend instinctively pushed off the plaintiff, Townsend's push was the defendant's act. This was correct. The act of Townsend was the direct and inevitable consequence of the defendant's act. The defendant set in motion the train of causes which led directly to the unfortunate result. In the language of De Grey, C. J., in Scott *v.* Shepherd, "I look upon all that was done subsequent to the original throwing, as a continuation of the first force and first act. The new direction and new force flow out of the first force, and are not a new trespass."

The act of Townsend is involuntary. Committing no voluntary wrong, he is but a link in the chain of causes of injury of which the defendant is the wrongful author. A man pushes another against a board, which, springing, repels the contact with the man, and throws the latter against a rock or upon the ground. It is the act and fault of the original assailant and not of the board. The man and not the board is liable. The result in law is the same whether the intermedi-

ate concurring object is a board or a boy, if the boy has no more volition than the board.

The defendant is to be regarded as "one who negligently sets mechanical forces in operation beyond his power to stop or safely direct, or as one who carelessly puts destructive implements or materials in situations where they are likely to produce mischief." Underhill *v.* Manchester, 45 N. H. 218.

The natural, innocent impulse of Townsend in this case is a natural force in Townsend, set in motion by the defendant, and in no essential particular differs from the natural forces of the material world. Guille *v.* Swan, 19 Johns. 381.

It was not necessary, therefore, as we regard it, that the jury should have come to the conclusion that Townsend pushed off the plaintiff in self-defense. They might have done so, upon the evidence; and upon such finding the defendant would clearly be liable. Such a condition of things would bring the case precisely within the doctrine of Scott *v.* Shepherd, and within the principle declared by Gould, J., when he says: "I think the defendant may be considered in the same view as if he himself had personally thrown the squib in the plaintiff's face. The terror impressed on Willis and Ryal excited self-defense, and deprived them of the power of recollection. What they did was therefore the inevitable consequence of the defendant's unlawful act. What Willis did was by necessity, and the defendant imposed that necessity upon him."

BLOOM *v.* FRANKLIN LIFE INSURANCE CO.

SUPREME COURT OF INDIANA, 1884.

[*Reported* 97 *Ind.* 478.]

ELLIOTT, C. J. The policy of insurance upon which the appellant's complaint is founded contains a provision that if the assured shall die by reason of intemperance from the use of intoxicating liquors, or in the known violation of the laws of the States or of the United States, the policy shall be void. The answer of the appellee, after setting forth the provision of the policy, proceeds as follows: "And this defendant avers that the said August Bloom, the assured, came to his death in the following manner, to wit: On or about the 29th day of December, 1881, the said August Bloom, while in a state of intoxication from the use of intoxicating liquors, did commit an assault and battery upon one Wilhelmina Bloom, the wife of his brother, Albert Bloom, at the town of Aurora, and State of Indiana, and while thus engaged in perpetrating said assault and battery, and while violently beating, bruising, choking, and maltreating her, the said wife of his brother, he, the said August,

being at the time in a state of intoxication, his brother, the said Albert, did then and there, for the purpose of lawfully defending his wife against said assault and battery, strike the said August Bloom upon the head with a jack plane, or some other wooden instrument, thereby fracturing the skull of him, the said August, and causing his death within a few hours thereafter."

There can be no question as to the force and validity of the provision of the policy declaring it to be of no effect in the event that the assured shall come to his death from the effects of intemperance, or while engaged in wilful violation of the law. We do not, indeed, understand the appellant as insisting upon the invalidity of this provision, but as asserting that the facts stated do not show that the assured died from the effects of intemperance, or that he met his death while engaged in knowingly violating the law.[1]

Whether the violation of the law was the proximate cause of death, and whether it was an act increasing the risk, must in general be determined from the facts of the particular case. There must in all cases, whether the law violated be a criminal or a civil one, be some causative connection between the act which constituted the violation of law and the death of the assured. A man engaged in uttering counterfeit money might meet his death while so engaged, and yet there might be circumstances which would destroy the causal connection between the death and the violation of law, and in such a case it is clear that the company would not be relieved from liability. On the other hand, an assured might bring on his death while engaged in the violation of a civil law, as, for instance, in the case of an attempt to force an entrance into a man's house for the purpose of arresting him on civil process. Another illustration may be found in the case of a railway engineer who, in violation of law, neglects to sound signals and brings on a collision in which he perishes, and a hundred examples are supplied in cases of collisions at sea or on navigable streams, brought about by a violation of maritime laws. It would not be difficult to multiply examples proving that the rule must be that the known violation of a positive law relieves the company where the act constituting the violation is the proximate cause of death, whether the positive law violated be a civil or a criminal one.

The act of the assured in this case was the proximate cause of his death within the meaning of the law. A man who makes a violent assault upon a woman puts his own person in danger, for a father, a husband, or a child may interfere to protect the assailed woman, and may overcome the assailant by force. Strangers not only may interfere to protect the person violently assaulted, but are, in strict law, under a duty to interfere. The natural result of such an illegal act as that of the assured, therefore, was to bring his person into danger, and as death resulted his own act was the proximate cause. It may

[1] Part of the opinion is omitted. — ED.

well be doubted whether an assured who violently assaults another does not cause a forfeiture, even though the rescuer uses excessive force; but that point we need not decide, for the interference in this instance was a lawful one. While the unlawful act of the assured must tend in the natural line of causation to his death, in order to work a forfeiture, it is not necessary that the act should be the direct cause, nor that the precise consequences which actually followed could have been foreseen. It is enough if the act is unlawful in itself, and the consequences flowing from it are such as might have been reasonably expected to happen, for in such a case the ultimate result is traced back to the original proximate cause. Terre Haute, etc., R. R. Co. *v.* Buck, 96 Ind. 346; Cincinnati, etc., R. R. Co. *v.* Eaton, 94 Ind. 474; Dunlap *v.* Wagner, 85 Ind. 529 (44 Am. R. 42); Binford *v.* Johnston, 82 Ind. 426 (42 Am. R. 508); Billman *v.* Indianapolis, etc., R. R. Co., 76 Ind. 166; S. C. 40 Am. R. 230. In the case of Cluff *v.* Mutual, etc., Co., *supra*, the decision was, that where the assured made an assault upon another, and the person assaulted killed him, the policy was forfeited. The same general doctrine was maintained in Bradley *v.* Mutual, etc., Ins. Co., *supra*, but it was held that where there was any conflict of evidence, the question of whether the death was the natural result of the wrongful act must be left to the jury. In the case of Insurance Co. *v.* Seaver, 19 Wall. 531, the assured was driving in a race, a collision took place, he leaped from his sulky and was killed, and the court held that death was proximately caused by the unlawful act of racing. The subject received consideration in Miller *v.* Mutual Benefit Ins. Co., 34 Iowa, 222, where the assured, while suffering from a fit of delirium tremens, escaped from his keepers, ran out into the street in inclement weather, and, by the exposure, brought on another form of disease which was the immediate cause of death. The court held that the proximate cause of death was the excessive use of intoxicating liquor. But there is really no reason for endeavoring to find insurance cases, for the fundamental principle must be the same whether the contract is one of insurance or an ordinary commercial agreement. The fundamental principle is as old as the "Squib Case" on the civil side of the common law, and on the criminal side as old at least as the time of Sir Matthew Hale. 1 Hale, P. C., 428; 1 Hawk., P. C., 93; Kelley *v.* State, 53 Ind. 311; Harvey *v.* State, 40 Ind. 516; Terre Haute, etc., R. R. Co. *v.* Buck, 96 Ind. 346, auth. p. 350.

Courts cannot be ignorant of the nature of men, and must attribute to them the ordinary passions and weaknesses inherent in human nature. It has been expressly adjudged that courts may presume that domestic animals will act in conformity to their usual propensities and habits, and surely there is stronger reason for extending this principle to beings of intelligence, reason, and affections. Wharton Neg., sections 100, 107; Billman *v.* Indianapolis, etc., R. R. Co., *supra*. It has, indeed, been laid down by respectable authority that notice will be taken of the

habits of men acting in masses, and if this be true, it must also be true that notice will be taken of what an ordinary man would likely do under a known state of affairs. Wharton Neg., section 108. These considerations lead to the conclusion that a man who beats and maltreats another's wife may reasonably expect the husband to defend her without being careful to select the means of defense, or to nicely weigh the degree of force. To expect a husband to act coolly and with careful circumspection in such a case is to expect an unreasonable thing. The probability is that the husband will in such a case use force, and this makes it probable that the one who assaults the wife will encounter force at the hands of the husband, and what is probable is, in legal contemplation, to be expected. Billman *v.* Indianapolis, etc., R. R. Co., *supra*, and authorities cited. If, therefore, an assured does assault another's wife, he does an unlawful thing which he must expect will bring upon him violence from the husband, and if this force leads to death, then the proximate cause of death is the unlawful act which provoked the use of violence.

The violation must be a known one, and we are inclined to think that the law violated must be a known one, that is, must be one of which the violator has, or should have, actual knowledge. But there are many things of which no man can be ignorant, and among the things of which no one can be ignorant is, that it is against the law to commit murder, to steal, or to violently beat another. We cannot doubt that the beating of Mrs. Bloom was an act known by the assured to be a violation of law.

The fact that the assured was intoxicated when he committed the assault and battery upon his brother's wife does not change the law. Drunkenness is no excuse for crime. Goodwin *v.* State, 96 Ind. 550, and authorities cited. A man who voluntarily makes himself drunk is in a measure responsible for his own irresponsibility. But, waiving this consideration, the degree of intoxication does not appear to have affected the mental capacity of the assured, and the presumption here is, as in all cases, that the mental condition was a normal one.

There is no force in the proposition that the assured did not lose his life in a known violation of law, but in consequence of the violation. The cause of the cause is in law sufficient, and the cause of the cause of death was the blow given while the assured was in the act of violating the law, and it is not material whether death did or did not immediately ensue. Terre Haute, etc., R. R. Co. *v.* Buck, *supra*.

What we have said disposes of all the questions in the case, and it is not necessary to examine the special finding.

Judgment affirmed.

154722

COMMONWEALTH *v.* CAMPBELL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1863.

[*Reported* 7 *All.* 541.]

INDICTMENT for murder, by shooting William Currier on the 14th of July, 1863. The trial took place in December, 1863, before BIGELOW, C. J., and METCALF, MERRICK, and HOAR, JJ. *Foster*, A. G., appeared for the Commonwealth, and *J. G. Abbott* and *B. F. Russell*, for the prisoner.

The homicide was committed near the armory in Cooper Street, in Boston, at about seven o'clock in the evening, during a riot which grew out of the enforcement of a draft of men for the army; and the evidence offered by the government tended to show that the prisoner was there participating in the riot, with a large number of other persons.[1] . . .

It appeared that a military force was called out to suppress the riot in Cooper Street, and was stationed in the armory, and that the mob were fired upon by the soldiers, and the soldiers by the mob. After the evidence on both sides was closed, the attorney general requested, for the convenience of counsel, a decision upon the following prayer for instructions: "That whether Currier was killed by a shot from within or without the armory, all the parties unlawfully engaged in the transactions which resulted in the homicide were at common law guilty, at least of manslaughter."

BIGELOW, C. J. The instruction asked for by the attorney general, as we understand it, is substantially this: If the defendant was a participator in the riotous assembly, and, during the attack made by it on the armory, a homicide took place, the defendant is in law guilty of manslaughter, although the evidence may fail to show whether the shot which killed the deceased was fired by the rioters with whom the prisoner was acting in concert, or by the soldiers who were within the armory, and engaged in resisting the attack made upon the building by the rioters outside. This seems to us to present a novel question. No authority has been cited which directly supports the position assumed by the attorney general, and so far as we know there is none to be found. This consideration, though by no means decisive, is entitled to some weight, because the law of homicide, in its application to almost every variety and combination of circumstances, especially to the taking of life by persons engaged in a tumult or riot or other unlawful enterprise or design, is perhaps more fully and clearly settled than any other branch of the law. But we are bound to examine the question further, and ascertain, if we can, whether the doctrine in question has any just foundation in the recognized principles of law by which criminal responsibility for the acts of others is regulated and governed.

[1] Part of the case discussing a question of evidence is omitted. — ED.

There can be no doubt of the general rule of law, that a person engaged in the commission of an unlawful act is legally responsible for all the consequences which may naturally or necessarily flow from it, and that, if he combines and confederates with others to accomplish an illegal purpose, he is liable *criminaliter* for the acts of each and all who participate with him in the execution of the unlawful design. As they all act in concert for a common object, each is the agent of all the others, and the acts done are therefore the acts of each and all. This doctrine, as applied to cases of homicide, is fully stated in 1 Hale P. C. 441, in a quotation from Dalton in these words: "If divers persons come in one company to do any unlawful thing, as to kill, rob, or beat a man, or to commit a riot, or to do any other trespass, and one of them in doing thereof kill a man, this shall be adjudged murder in them all that are present of that party abetting him and consenting to the act or ready to aid him, although they did but look on." So in 1 East P. C. 257, it is laid down that "where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it with violence, or in such a manner as naturally tends to raise tumults and affrays; as by committing a violent dissesisin with great numbers, or going to beat a man, or rob a park, or standing in opposition to the sheriff's posse, they must at their peril abide the event of their actions;" and if in doing any of these or similar acts any person interfering with them is killed, all who took part in the fact or abetted thereto are guilty of murder. These citations to which many others of a similar tenor might be added, show that the rule of criminal responsibility for the acts of others is subject to the reasonable limitation that the particular act of one of a party for which his associates and confederates are to be held liable must be shown to have been done for the furtherance or in prosecution of the common object and design for which they combined together. Without such limitation, a person might be held responsible for acts which were not the natural or necessary consequences of the enterprise or undertaking in which he was engaged, and which he could not either in fact or in law be deemed to have contemplated or intended. No person can be held guilty of homicide unless the act is either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by some one acting in concert with him or in furtherance of a common object or purpose. Certainly that cannot be said to be an act of a party in any just sense, or on any sound legal principle, which is not only not done by him, or by any one with whom he is associated or connected in a common enterprise, or in attempting to accomplish the same end, but is committed by a person who is his direct and immediate adversary, and who is, at the moment when the alleged criminal act is done, actually engaged in opposing and resisting him and his confederates and abettors in the accomplishment of the unlawful object for which they are united. Suppose, for example, a burglar attempts to break into a dwelling-house, and the owner

or occupant, while striving to resist and prevent the unlawful entrance, by misadventure kills his own servant. Can the burglar in such case be deemed guilty of criminal homicide? Certainly not. The act was not done by him, or with his knowledge or consent; nor was it a necessary or natural consequence of the commission of the offence in which he was engaged. He could not therefore have contemplated or intended it. Another illustration will perhaps be more apposite to the case before us. Suppose, during the progress of the riot in which it is alleged the prisoner was engaged, and while the soldiers and others in possession of the armory were in the act of repelling the attack of the mob in the street by firing upon it with a cannon which was used on the occasion, that it had burst by reason of some secret defect, and killed several of those who were in its immediate vicinity; or that a soldier while handling his musket had by accident inflicted a mortal wound on himself; it would hardly be contended that in either of these cases the whole body of rioters could be held legally responsible for criminal homicide, by reason of the lives that were thus destroyed. And yet there is no real distinction between the cases supposed and that of the prisoner at the bar, if the rule insisted on by the attorney general is a sound one. The taking of human life, under the circumstances supposed, in a certain sense was the result of the unlawful acts of the mob — that is, it would not have occurred but for the riot which furnished the cause and occasion of the use of the musket or cannon.

Indeed, it seems to us that in every aspect the doctrine contended for, if followed to its legitimate and logical conclusion, would lead to extraordinary consequences. It would render everybody who participated in a transaction, whether acting in concert or in opposition, whether united in a common design or arrayed on opposite sides in a contest or affray in which each contending party was striving to defeat the purposes of the other, if all acted without legal justification, responsible for every criminal act which was done by any person during the progress of the affair in which they were all engaged. Nor, in applying the principle in question to a case like the one before us, can we see any good reason why the soldiers who defended the armory and resisted the mob, if it should turn out that they acted without sufficient legal authority to justify their acts, might not be held guilty of manslaughter for homicides committed by the rioters, if the latter are to be held responsible for deaths caused by the acts of the soldiers? But the rules of law do not give any countenance to such a doctrine. The real distinction is between acts which a man does either actually or constructively, by himself or his agents or confederates, and those which were done by others acting not in concert with him or to effect a common object, but without his knowledge or assent, either express or implied. For the former the law holds him strictly responsible, and for all their necessary and natural consequences, which he is rightfully deemed to have contemplated and intended. For the latter he is not liable, because they are not done by himself or by those with whom he

is associated, and no design to commit them or intent to bring about the results which flow from them can be reasonably imputed to him. So the rule of law was manifestly understood by the framers of the clause contained in Rev. Sts. c. 129, § 6, reënacted in Gen. Sts. c. 164, § 6, which provides that if any officer, magistrate, or other person, acting in the suppression of an unlawful assembly, tumult, or riot is killed or wounded, all persons taking part in such violation of law shall be answerable therefor. This was clearly not intended as a limitation of the liability at common law, but only as declaratory of the rule as it then existed and was understood.

The case of the Philadelphia rioters, cited by the attorney general from the Appendix to Wharton's Law of Homicide, 477, is obscurely and imperfectly reported. If it can be supported at all as a true exposition of the law, it can only be upon the ground that both parties or sides had a common object in view, namely, a breach of the peace, and that both went out by an agreement or mutual understanding to engage in an affray or riot. If such was the fact, then, as in the case of a duel, although to accomplish the common purpose they took opposite sides, still they might all well have been deemed to have confederated together in an unlawful enterprise, and thus to have become responsible, on the principle already stated, for a criminal act done in pursuance of the common design by any one of their confederates, with whichever side he may have acted in the affray.

It may properly be added that we can see no foundation in any aspect of the case for the distinction suggested by the attorney general as to the degree of homicide of which the defendant would be guilty, in the event that the jury should find that the deceased was killed by a shot fired by the soldiers in the armory, and not by the mob. If the doctrine contended for is correct, there can be no valid reason for holding the defendant guilty of manslaughter only. If he, as one of the riotous conspirators, is liable at all for acts done by the soldiers and others coöperating with them, his guilt must be the same in degree as if a homicide was committed by one of the rioters with whom he was acting in concert. If it was his act at all, then it was committed by him or his confederates while engaged in an unlawful enterprise, and, according to well-settled principles, it would be murder, and not manslaughter. But, for the reason already given, it cannot be regarded as an act for which he is in law responsible. If the homicide was the result of a shot fired by the soldiers or other persons in the armory, acting together in defence against the riotous assembly, the defendant cannot be held guilty of either murder or manslaughter. The jury will accordingly be instructed that, unless they are satisfied beyond a reasonable doubt that the deceased was killed by means of a gun or other deadly weapon in the hands of the prisoner, or of one of the rioters with whom he was associated and acting, he is entitled to an acquittal. *The jury acquitted the prisoner.*[1]

[1] *Acc.* Butler v. People, 125 Ill. 641, 18 N. E. 338; Com. v. Moore (Ky.), 88 S. W. 1065. Ed.

13422

PULLMAN PALACE CAR CO. *v.* BLUHM.

SUPREME COURT OF ILLINOIS, 1884.

[*Reported* 109 *Ill.* 20.]

THE action rests upon allegations by appellee, in his declaration, that being a laborer for appellant, using a defective derrick of appellant in elevating lumber to the upper part of a building of appellant, he was hurt by the falling of the lumber upon him, "maiming, bruising, and battering him, and breaking and bruising his arm, and so disabling him that he has been unable to do manual labor from thence hitherto and remains still in the same condition," and that the falling of the lumber was caused "by reason of the unskillful and defective workmanship of defendant" in constructing and erecting the derrick, and "without any fault" upon the part of plaintiff.

DICKEY, J. . . . It is insisted that the court erred in permitting plaintiff to prove, in enhancement of his damages, that his arm, which was broken between the shoulder and elbow, was not cured, and that the parts of the bone, instead of uniting in one, had failed to unite, and formed what is called a "false joint." Appellant insists that this last was the result of bad surgery, and, to be proven, should have been set out as special damages, not being, as he suggests, such damages as ordinarily arise from a broken arm. We think the declaration is sufficiently specific to admit the proof. Whether this particular ailment (the false joint) was, or was not, the result of the breaking of the arm as a proximate cause, or the result of a new, independent factor, for which appellant was not responsible, could not be determined by the court as a question of law. It could be properly tested only by hearing the evidence and submitting the questions of fact to a jury, under appropriate instructions.

There is evidence tending to show that had this broken arm received ordinary care and professional skill, the parts would have united with little or no permanent injury, and on this hypothesis alone appellant insists that the matter of this false joint should have been, at least hypothetically, excluded from the jury. We understand the law on this subject to be, that plaintiff cannot hold defendant answerable for any injury caused, even in part, by the fault of plaintiff in failing to use ordinary care or ordinary judgment, or for any injury not resulting from the fault of defendant, but caused by some new intervening cause not incident to the injury caused by defendant's wrong. Thus, in this case, if it be conceded that the false joint, under proper

care and skill, would not have resulted from the breaking of the arm alone, but was brought about by the subsequent separation of the parts after they had been properly set, and before nature had formed a firm union, then, if this subsequent separation of the parts had been caused by an assault and battery by a stranger, or some foreign cause with which appellant had no connection, and which was not in its nature incident to a broken arm, plainly appellant ought not to be held to answer for the false joint; but if appellee exercised ordinary care to keep the parts together, and used ordinary care in the selection of surgeons and doctors, and nurses, if needed, and employed those of ordinary skill and care in their profession, and still by some unskillful or negligent act of such nurses, or doctors or surgeons, the parts became separated, and the false joint was the result, appellant, if responsible for the breaking of the arm, ought to answer for the injury in the false joint. The appellee, when injured, was bound by law to use ordinary care to render the injury no greater than necessary. It was therefore his duty to employ such surgeons and nurses as ordinary prudence in his situation required, and to use ordinary judgment and care in doing so, and to select only such as were of at least ordinary skill and care in their profession. But the law does not make him an insurer in such case that such surgeons or doctors, or nurses, will be guilty of no negligence, error in judgment, or want of care. The liability to mistakes in curing is incident to a broken arm, and where such mistakes occur (the injured party using ordinary care) the injury resulting from such mistakes is properly regarded as part of the immediate and direct damages resulting from the breaking of the arm.[1]

SAUTER v. NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

COURT OF APPEALS OF NEW YORK, 1876.

[*Reported* 66 *N. Y.* 50.]

CHURCH, C. J. The circumstances proved were sufficient to authorize the jury to find that the injury was caused by the act of the defendant's employees. The evidence tends to show that as the plaintiff's intestate was passing out of the car to alight, a sudden jerk was given

[1] See also Wallace v. Pennsylvania R. R., 222 Pa. 556, 71 Atl. 1086. — ED.

to it backward, and the plaintiff was thrown suddenly forward, his carpet-bag striking the railing, and he striking the carpet-bag. This was proved to be sufficient to cause the hernia of which he died. The circumstances pointed to this as the cause, and repelled the idea of any other. True, the evidence was that it might have been produced by many other causes, but there was no evidence tending to prove that it was produced by any other. On the contrary, the inference was legitimate that it was not.

It is claimed that the injury was not the proximate cause of death. The deceased had what the surgeons denominated strangulated hernia, an injury certain to produce death, unless relieved. Being unable to reduce it by pressure, an operation was decided upon and performed by surgeons of conceded competency and skill. The operation is a very delicate and dangerous one, but is often and perhaps generally performed with success. In this case the *post-mortem* examination disclosed that there were two strictures, only one of which had been cut, and that a mistake was made by pressing the intestine into an abnormal cavity, between the peritoneum and pubic bone, produced in some manner by a separation of the peritoneum from the bone, instead of pressing it into the abdomen. There was a difference of opinion whether the immediate cause of death was by the mistake in pressing the intestine into the wrong cavity or by the natural effect of the second stricture which was not cut; but assuming that it was the mistake, which is the most favorable for the defendant, is the principle invoked by the learned counsel applicable? I think not. The cases cited do not sustain the position. The case of Patrick *v.* Commercial Insurance Company, 11 J. R. 14, was an action upon a policy against sea risks. The vessel stranded, but before she could be got off she was forcibly seized and burned by a public enemy, and it was very properly held that the damage was from the capture, and not the stranding. Levie *v.* Janson, 12 East., 655, was analagous in principle. To bring a case within the principle claimed, the general rule is that the actual injury must be occasioned by the intervention of some responsible third party or power. (Wharton on Neg., § 134.) I do not think that the mistake of the surgeon can, in any sense, be regarded as such. The employment of a surgeon was proper, and may be regarded as a natural consequence of the act, and the mistake which it is evident might be made by the most skillful, may be regarded of the same character. In Lyons *v.* The Erie Railway, 57 N. Y. 489, the Commission of Appeals held, if one who is injured by the negligence of another, acts in good faith under the advice of a competent physician, even if it is erroneous, he may recover, and that the error is no shield to the wrongdoer. The rule is laid down in Commonwealth *v.* Hackett, 2 Allen, 137, that one who has wilfully inflicted upon another a dangerous wound from which death ensued, is guilty of murder or manslaughter, as the case may be, although, through

want of due care or skill, the improper treatment of surgeons may have contributed to the result.

Here it is sought to shield the wrongdoer because the deceased failed to procure relief, although he used the usual and best available means for that purpose. He would have died without an operation; assuming that by the mistake of the surgeon the operation was not successful, can it be justly said, in the first place, that the surgeon and not the injury killed him; and in the second place, that the surgeon is to be regarded as a responsible intervening third person, within the rule referred to? There is no authority that approaches such a proposition. Hence there was no error in refusing to charge that if death was proximately caused by pressing the intestine into the abnormal cavity, the plaintiff could not recover. The court had charged that if the hernia was not the proximate cause of death the plaintiff could not recover, nor unless it was caused by the defendant. The court also charged that if death was produced by the error, ignorance, blunder, or maltreatment of the surgeon, the plaintiff could not recover. The charge was quite as favorable to the defendant as the case would warrant.

Error is also alleged upon the refusal of the court to charge that the plaintiff could not recover, unless the jury found that the injury would be reasonably apprehended by a prudent man as the result of the alleged movement of the cars. The court declined to charge other than as he had charged. He had charged that if after the train was stopped it was given such a jolt as to endanger the lives of passengers, the act would be wrongful. The sudden jerking of a train backward while passengers are rightfully passing out of the cars, is evidently liable to produce accidents, and under such circumstances is a negligent act. There was no foundation, therefore, for the test of apprehended danger by a prudent man. At all events, the charge made was favorable to the defendant in any aspect of the case. The Northampton tables were properly received. (Schell *v.* Plumb, 55 N. Y. 592.) The probable duration of the deceased's life was an element in estimating damages, and being so, it was proper to give this evidence upon the question.

The judgment must be affirmed.
All concur.
Judgment affirmed.

13422

COMMONWEALTH v. HACKETT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1861.

[*Reported* 2 *All.* 136.]

INDICTMENT for murder.[1]

The defendant contended that there was evidence to show the wounds of the deceased were unskilfully and improperly treated by the surgeons who attended him, and requested the court to instruct the jury as follows: "1. The rule that the death must happen within a year and a day is one of limitation only, and does not change the burden of proof, or release the government from the duty of proving affirmatively that the deceased died of the wounds alleged in the indictment. 2. It is not enough to satisfy this burden for the government to prove that without the wounds the deceased would not have died. 3. If the death was caused by the improper applications or improper acts of the surgeons in dressing the wounds, the case of the government is not made out."

The court instructed the jury in conformity with the first clause of the instructions asked for, but declined to give the others, and in place thereof instructed them, substantially, that the burden of proof was upon the government to prove beyond a reasonable doubt that the deceased died of the wounds inflicted by the defendant, but that this general rule required explanation in its application to certain aspects of the present case; that a person who has inflicted a dangerous wound with a deadly weapon upon the person of another cannot escape punishment by proving that the wound was aggravated by improper applications or unskilful treatment by surgeons; that if, in the present case, they were satisfied that the wounds inflicted by the defendant were improperly and unskilfully treated by the surgeons in attendance, and that such treatment hastened or contributed to the death of the deceased, the defendant was not for this reason entitled to an acquittal; but that the rule of law was that, if they were satisfied beyond a reasonable doubt that the defendant inflicted on the deceased dangerous wounds with a deadly weapon, and that these wounds were unskilfully treated, so that gangrene and fever ensued, and the deceased died from the wounds combined with the maltreatment, the defendant was guilty of murder or manslaughter according as the evidence proved the one or the other; that, if they were satisfied not only that death would not have ensued but for the wounds, but also that the wounds were, when inflicted, dangerous, the defendant would be responsible, although improper and unskilful treatment might have contributed to the death; that the law does not permit a person who has used a deadly weapon, and with it inflicted a dangerous wound upon another, to attempt to apportion his own wrongful and wicked act, and divide

[1] Part of the case, which discussed the admissibility of certain evidence, is omitted. — ED.

the responsibility of it, by speculating upon the question of the extent to which unskilful treatment by a surgeon has contributed to the death of the person injured; but, if they were in doubt whether the wounds were dangerous, or caused or contributed to the death, or whether the deceased might not have died from the unskilful treatment alone, then the defendant would be entitled to an acquittal.

The defendant was found guilty of manslaughter, and alleged exceptions.

BIGELOW, C. J. . . . We have looked with care into the authorities which bear on the correctness of the instructions given to the jury, relating to the unskilful or improper treatment of the wounds alleged to have been inflicted by the prisoner upon the body of the deceased. We find them to be clear and uniform, from the earliest to the latest decisions. In one of the first reported cases it is said that "though a wound may be cured, yet if the party dieth thereof, it is murder." The King *v.* Reading, 1 Keb. 17. The same principle is stated in 1 Hale P. C. 428, thus: "If a man give another a stroke which it may be is not in itself so mortal but that with good care he might be cured, yet if he die of this wound within a year and a day, it is homicide or murder, as the case is, and so it has been always ruled." "If a man receives a wound, which is not in itself mortal, but either for want of helpful applications, or neglect thereof, it turns to a gangrene, or a fever, and that gangrene or fever be the immediate cause of his death, yet, this is murder or manslaughter in him that gave the stroke or wound, for that wound, though it were not the immediate cause of death, yet, if it were the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently is *causa causati*." In Rew's case, as stated in 1 East P. C. c. 5, § 113, it was determined that "though the stroke were not so mortal in itself but that with good care and under favorable circumstances the party might have recovered, yet if it were such from whence danger might ensue, and the party neglected it, or applied inefficacious medicines, whereby the wound which at first was not mortal in itself turned to a gangrene, or produced a fever, whereof he died, the party striking shall answer for it, being the mediate cause of the death." J. Kel. 26. So, in a more recent case, the jury were instructed that if the defendant wilfully and without justifiable cause inflicted a wound, which was ultimately the cause of death, it made no difference whether the wound was in its nature instantly mortal, or whether it became the cause of death by reason of the deceased not having adopted the best mode of treatment. The real question is, was the wound the cause of death. Regina *v.* Holland, 2 M. & Rob. 351. From these and other authorities, the well established rule of the common law would seem to be, that if the wound was a dangerous wound, that is, calculated to endanger or destroy life, and death ensued therefrom, it is sufficient proof of the offence of murder or manslaughter; and that the person who inflicted it is responsible,

though it may appear that the deceased might have recovered if he had taken proper care of himself, or submitted to a surgical operation, or that unskilful or improper treatment aggravated the wound and contributed to the death, or that death was immediately caused by a surgical operation rendered necessary by the condition of the wound. 1 Russell on Crimes (7th Amer. ed.), 505; Roscoe's Crim. Ev. (3d ed.) 703, 706; 3 Greenl. Ev. § 139; Commonwealth *v.* Green, 1 Ashm. 289. Regina *v.* Haines, 2 Car. & Kirw. 368; State *v.* Baker, 1 Jones Law R. (N. C.) 267; Commonwealth *v.* M'Pike, 3 Cush. 184. The principle on which this rule is founded is one of universal application, and lies at the foundation of all our criminal jurisprudence. It is, that every person is to be held to contemplate and to be responsible for the natural consequences of his own acts. If a person inflicts a wound with a deadly weapon in such manner as to put life in jeopardy, and death follows as a consequence of this felonious and wicked act, it does not alter its nature or diminish its criminality to prove that other causes coöperated in producing the fatal result. Indeed it may be said that neglect of the wound or its unskilful and improper treatment, which were of themselves consequences of the criminal act, which might naturally follow in any case, must in law be deemed to have been among those which were in contemplation of the guilty party, and for which he is to be held responsible. But however this may be, it is certain that the rule of law, as stated in the authorities above cited, has its foundation in a wise and sound policy. A different doctrine would tend to give immunity to crime, and to take away from human life a salutary and essential safeguard. Amid the conflicting theories of medical men, and the uncertainties attendant on the treatment of bodily ailments and injuries, it would be easy in many cases of homicide to raise a doubt as to the immediate cause of death, and thereby to open a wide door by which persons guilty of the highest crime might escape conviction and punishment.

The instructions to the jury at the trial of this case were in strict conformity with the rule of law as it has always been understood and administered. Indeed the learned counsel does not attempt to show that it has ever been held otherwise. His argument on this point is confined to the signification which he attributes to the word maltreatment. This he assumes to be either wilful ill treatment, involving bad faith, of the wound of the deceased, or such gross carelessness in its management by the surgeons as would amount to criminality. But such is not its true meaning. Maltreatment may result either from ignorance, neglect, or wilfulness. It is synonymous with bad treatment, and does not imply, necessarily, that the conduct of the surgeons, in their treatment of the wounds of the deceased, was either wilfully or grossly careless. Nor was it used in any such narrow or restricted sense in the instructions given to the jury. On the contrary, in the connection in which it stands, it signifies only improper or unskilful treatment, and was intended to apply to the evidence as it was developed at the trial. *Exceptions overruled.*

PEOPLE v. COOK.

SUPREME COURT OF MICHIGAN. 1878.

[*Reported* 39 *Mich.* 236.]

MARSTON, J.[1] . . . The ninth request was not given. This request was based upon a theory that where a mortal wound has been given, but the death is actually produced by morphine administered by the hand of another, there must be an acquittal. The State *v.* Scates, 5 Jones (N. C.), 420, was relied upon as an authority in support of this proposition. In that case the jury was charged that if one person inflicts a mortal wound, and before the assailed person dies, another person kills him by an independent act, the former is guilty of murder, and this was held error.

This case does not, however, come within the principle of that case. Here a mortal wound was given. Physicians were called in who prescribed for and treated the wounded man. Morphine was administered, and, it is claimed, in such unreasonably large quantities that it caused death. It was not claimed that these physicians were deficient in medical skill, or that morphine in proper quantities, and at proper times, should not have been administered, or that the deceased could, under any treatment, or in the absence of all treatment, have survived. Admitting the correctness of the authority relied upon, what application can such a rule have to cases like the present? If death was actually produced by morphine, can it be said in view of the facts "that another person killed the deceased by an independent act?" Here morphine was administered as a medicine by competent and skilful physicians; it was a proper and appropriate medicine to be given. Was it the independent act of the physicians who prescribed, or of the nurses who administered the morphine? Was it the mortal wound likely to cause death at any moment, or an undue quantity of medicine unskilfully but honestly given to alleviate suffering, which actually caused death? Were the last powders, which constituted the overdose, given during the dying man's last moments, or so recently before death that they could not have caused it or materially contributed thereto? How, under the conflicting theories and uncertainties which would inevitably arise in such a case, could it be said which was the real cause? Could it be made to appear with clearness and certainty that not the wound, but the medicines administered were the sole cause of the death? There are authorities which hold that the burthen of so proving would rest upon the accused, in cases where the wound was not a mortal one. The position which counsel seeks to establish amounts to this: that if a competent physician and surgeon in the treatment of a mortal wound directly causes death, although hastened

[1] Only so much of the opinion as discusses the question of causation is given. — ED

by never so short a period, the assailant is excused, even although death would inevitably have resulted from the wound under any or in the absence of all treatment. Such is not the law. Neglect or mistreatment, and beyond such this case does not go, will not excuse, except in cases where doubt exists as to the character of the wound. Where death results in a case like the present, it can in no proper or legal sense be said to be the independent act of a third person. In a case where the wound is not mortal, the injured person may recover, and thus no homicide have been committed. If, however, death do result, the accused will be held responsible, unless it was occasioned, not by the wound, but by grossly erroneous medical treatment. But where the wound is a mortal one, there is no chance for the injured person to recover, and therefore the reason which permits the showing of death from medical treatment does not exist. State *v.* Corbett, 1 Jones (Law), 267; State *v.* Morphy, 33 Ia. 270: 11 Amer. 122, note and cases cited; Roscoe's Crim. Ev. 717.

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BUSH *v.* COMMONWEALTH.

COURT OF APPEALS OF KENTUCKY. 1880.

[*Reported* 78 *Ky.* 268.]

HINES, J.[1] . . . The following instruction is also objected to, to wit: "If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, John Bush, in Fayette county, and before the finding of the indictment, wilfully shot Annie Vanmeter with a pistol, and that she died from the effects of the wound then inflicted upon her, whether said wound was the sole cause or was a contributory agency in producing death, when such shooting was not necessary, and not reasonably believed by the defendant to be necessary for his own protection from immediate death or great bodily harm then threatening him, the jury should find the defendant guilty: guilty of murder if the killing were also done with malice aforethought, or guilty of manslaughter if the killing were done in sudden heat and passion, and without malice."

It is proper in this connection to state that the evidence was such as to justify the jury in finding that the wound inflicted by the shot was neither necessarily nor probably mortal, and that the death ensued, not from the wound, but from scarlet fever, negligently communicated by the attending physician.

As said in Commonwealth *v.* Hackett (2 Allen, 141), the rule of the common law would seem to be, that if the wound was a dangerous wound, that is, calculated to endanger or destroy life, and death ensued therefrom, it is sufficient proof of murder or manslaughter; and that

[1] Only so much of the opinion as discusses the question of causation is given. — ED.

the person who inflicted it is responsible, though it may appear that the deceased might have recovered if he had taken proper care of himself, or submitted to a surgical operation, or that unskilful or improper treatment aggravated the wound and contributed to the death, or that death was immediately caused by a surgical operation rendered necessary by the condition of the wound. The principle on which this rule is founded is that every one is held to contemplate and to be responsible for the natural consequences of his own acts. But if the wound is not dangerous in itself and death results from improper treatment, or from disease subsequently contracted, not superinduced by or resulting from the wound, the accused is not guilty. (1 Hale's P. C. 428; Parsons *v.* State, 21 Ala. 301.) When the disease is a consequence of the wound, although the proximate cause of the death, the person inflicting the wound is guilty, because the death can be traced as a result naturally flowing from the wound and coming in the natural order of things; but when there is a supervening cause, not naturally intervening by reason of the wound and not produced by any necessity created by the wound, the death is by the visitation of Providence and not from the act of the party inflicting the wound. In the case under consideration, the fever was not the natural consequence of the wound, nor was it produced by any necessity created by the infliction of the wound. It did not render it necessary to have the wound treated by a physician just recovering from the scarlet fever, even if it be conceded that medical treatment was necessary at all. If the death was not connected with the wound in the regular chain of causes and consequences, there ought not to be any responsibility. If a new and wholly independent instrumentality interposed and produced death, it cannot be said that the wound was the natural or proximate cause of the death. (14 Grattan, 601, Livingston *v.* Commonwealth.) This view of the law was not so presented to the jury as to give the appellant its full benefit. It should have been clearly and definitely presented to the jury that if they believed from the evidence that death would not have resulted from the wound but for the intervention of the disease, they should not find the accused guilty of murder or manslaughter, but that they might find him guilty of wilfully and maliciously shooting and wounding under section 2, article 6, chapter 29, General Statutes; or of shooting and wounding in sudden affray, or in sudden heat and passion, without malice, under section 1, article 17, chapter 29, General Statutes.

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THOMPSON v. LOUISVILLE & NASHVILLE RAILROAD CO.

SUPREME COURT OF ALABAMA, 1890.

[*Reported* 91 *Ala.* 496.]

COLEMAN, J. The suit is brought to recover damages for injuries alleged to have been wrongfully inflicted by the defendant on J. R. Thomas, an employee, on the 22d day of September, 1889, and from which, it is charged, the death of said employee resulted on the 29th September, 1889. The section of the code (section 2591) under which this suit is brought provides that the personal representative may sue if such injury "results" in the death of the servant or employee. The section so often construed by this court provides that the suit may be brought by the representative to recover damages for the injury, whereby the death was "caused." Code, § 2589. "Cause" is that which produces an effect. "Result" is the effect of one or more concurrent causes. The same principles of law are alike applicable in either case. The testimony of skillful physicians tended to show that the injury inflicted was mortal, and the injured party would have died from the effects of the injury "in a short time." There was evidence also tending to show the wounds were not "necessarily mortal." The evidence showed that by mistake the wife of the deceased, who was his nurse, gave to him internally four or five grains of corrosive sublimate, which had been left by the physician to be used as a wash, and not to be given internally. It was proven that the poison would have caused the death of a well person, and it was in evidence that the poison was the immediate cause of death. The testimony of the physicians further tended to show the wound was of such a character "that it may have hastened the death"; "may have caused him to die sooner from the effects of the corrosive sublimate than if he had not received the wound"; "that the corrosive sublimate administered to Thomas would have produced death 'quicker' in a man in Thomas' condition from the wounds received by him, than in a well man." Among others, the court charged the jury that, under the evidence in this case, the death of plaintiff's intestate must have resulted either from the injury he received or from the poison he took. The injury and poison cannot both be the cause of his death. Further, that his death could not be the result of the injury, and, at the same time, the result of the poison. Further, that if he died from the effects of the poison, then they must find for the defendant, although his death was accelerated by reason of the injury received; or if he died "sooner" from the effects of the poison than he would have died, if he had not been injured.

In the case of Railroad Co. v. Jones, 83 Ala. 376, 3 South. Rep. 902, the court declared that although Mrs. Jones had pneumonia, from which she would ultimately have died, yet, if the injury caused by the negligence of the railroad, under the rules above declared, contributed and hastened her death, the corporation would not be guiltless. "That the railroad would not be exempt from liability for such an injury unless her death was solely the result of bad health." It does not follow that, because a man cannot die but once, there cannot be two or more concurrent, coöperative, and efficient causes to effect the one killing. A person may be killed by "beating and starving." There may be contributing causes. 3 Greenl. Ev., § 141. If, as the testimony tended to show, the injury received was mortal, and caused decedent to die "sooner" or "quicker" from the effects of the poison than he would have died had he not been injured, it is difficult to perceive how the poison can be regarded as the "sole" cause of his death at the time it occurred. If he would have lived longer without the injury than with the injury, the injury necessarily contributed to and accelerated his death, and was a part of the cause, causing death at the time it occurred. It is not intended by the court to assert the doctrine that, if a party inflict an injury not mortal, and, by the intervention of other causes, death results, the party inflicting the injury in all cases shall be held responsible for the death. The first cause may or may not be regarded as the proximate cause of a result according to the facts of the case. Bowles v. State, 58 Ala. 338, and authorities cited; 2 Bish. Crim. Law, § 668; 1 Shear. & R. Neg., § 125; Insurance Co. v. Tweed, 7 Wall. 44; Railroad Co. v. Kellogg, 94 U. S. 469; and many others. Railroad Co. v. Buck, 49 Amer. Rep. 170; Railway Co. v. Kemp, 48 Amer. Rep. 136; Scheffer v. Railroad Co., 105 U. S. 249. The court ought not to have charged the jury, as a conclusion of law, that death did not and could not have resulted from both causes, the injury and the poison, in the face of the testimony of the physicians examined as witnesses to the effect that the death of the decedent was "accelerated" by the injury, or that the injury may have caused him to die "quicker" than he would have died without the injury. The charges of the court assert the further proposition that, though the injury inflicted was fatal, yet if, before death, the poison was given, and was sufficient to cause death, and was the immediate cause of death, the poison must be regarded as the proximate cause, and the jury must find for the defendant. To support this charge, the following proposition of law is cited, and many authorities and illustrations of the principle are given: "That if a new force or power intervenes, sufficient of itself to stand as the cause of the misfortune, the other must be considered as too remote." We concede the correctness of the proposition, and its general acceptance, but do not concede its applicability to a case like the present. When the evidence shows that the result was not the probable or legitimate result of the first cause, and might not

have resulted, but for some new, intervening cause, or this is a matter of contest, in such cases, the intervening cause may be regarded as the proximate cause, and the first as too remote; but we have been cited to no authority in a suit for the recovery of damages, where it was shown that, if the "result" was the necessary and inevitable effect of a first cause, and a new independent force intervened sufficient of itself to produce the effect, and only hastened the result, the first cause was held to be too remote. In such cases both causes necessarily contribute to the result. The difference may be illustrated in the well-known case of the squib, cited by counsel. Scott *v.* Shepherd, 2 W. Bl. 892. If the person who first threw the squib had thrown it in a place where its explosion would have been harmless, and someone, without reason or excuse, had picked it up, and started it again, with the injurious results that followed its explosion, this would have presented a case where the new and intervening cause would have been held the proximate cause, and sufficient to stand for the misfortune. A better illustration, and more applicable, is that of the chain. "An article at the end of a chain may be moved by a force applied at the other end, that force being the proximate cause." Railway Co. *v.* Kellogg, 94 U. S. 474. Suppose the force at the other end is not sufficient to move the article, and a new, independent, intervening force is applied, which effects a removal, the new force will be held the proximate cause. But if the original force itself is sufficient to move the article, and will surely move it, and a new, independent force intervenes, sufficient of itself to move the article, and which in consequence of the first force, accelerates or hastens the movement of the article, the new force does not "solely" or "alone" produce the movement, but the first force is concurrent and coöperates with the new force, and is a sufficient cause. If two persons wrongfully block up a street so that one is injured in attempting to pass, neither of the culpable parties can excuse himself by showing the wrong of the other, for the injury is the natural and proximate result of his own act. Cooley, Torts, p. 79. If a wound is inflicted, not dangerous of itself, and death was evidently occasioned by grossly erroneous treatment, the original author will not be accountable; but, if the wound was mortal, the person who inflicted it cannot shelter himself under the plea of erroneous treatment. 1 Hale, P. C., 428; 1 East., P. C., 344, § 113; Parson *v.* State, 21 Ala. 301. So, in this case, if the injury had not been mortal, the poison would have been regarded as the proximate cause, according to the facts of the case, governed by other principles of law. See Bowles *v.* State, 58 Ala. 335, and authorities cited, *supra*. But, if the wound was mortal, the person who inflicted it cannot shelter himself under the plea of a new, intervening cause, if it be shown that the injury caused death to happen "sooner" than it would have happened without the injury. If the original wrong becomes injurious only in consequence of some distinct wrongful act or omission by another, the injury shall be

imputed to the last wrong. "But if the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person, and does actually result in injury, through the intervention of causes which are not wrongful, the injury shall be referred to the wrongful cause." If damage has resulted directly from concurrent wrongful acts of two persons, each of these acts may be counted on as the proximate cause, and the parties held responsible jointly or severally for the injury. Cooley, Torts, pp. 68, 70, 78. These several principles of law fully illustrate the distinction to be observed, and the rules to govern in the present case. The principles of law declared in the following cases, carried out to their legitimate conclusions, tend to sustain the views here stated. Sauter *v.* Railroad Co., 66 N. Y. 50; Railroad Co. *v.* Buck, 49 Amer. Rep. 168; Beauchamp *v.* Mining Co., 50 Mich. 163, 15 N. W. Rep. 65. The measure of proof required by the use of the words "any doubt" in charge No. 17 is too high, and, although followed by explanatory or qualifying words, the use of the word "proper" in the explanatory clause is misleading. A "reasonable conviction" is what the law requires. Railroad Co. *v.* Jones, 83 Ala. 376, 3 South. Rep. 902; Wilkinson *v.* Searcy, 76 Ala. 182. Exemplary damages are not recoverable in this action. See Railroad Co. *v.* Orr, *ante*, 360 (at this term). The complaint, as amended, was sufficient. Reversed and remanded.

KEATON *v.* STATE.

COURT OF CRIMINAL APPEALS OF TEXAS. 1900.

[*Reported* 41 *Texas, Cr. R.* 621.]

BROOKS, J.[1] . . . The court, among other things, charged the jury as follows: "Unless you further believe from the evidence, beyond a reasonable doubt, that defendant Pearce Keaton entered into a conspiracy with Bud Newman, Jeff Taylor, and Bill Taylor, or either of them, to commit the offence of robbery, — that is, to rob the express company on the Gulf, Colorado & Santa Fe Railway Company's road at Coleman Junction, — and agreed among themselves as to the part each was to perform in the said enterprise of robbery, and that in pursuance of said agreement and conspiracy defendant, with the said parties named, or either one of them, did go to Coleman Junction, and that said Coleman Junction was and is in Coleman County, Texas, and did then and there, in pursuance of said conspiracy, attempt to commit and perpetrate the crime of robbery, and for the purpose of accomplishing said robbery, and for the purpose of aiding and assisting in its perpetration, the defendant either alone or acting together with said Newman and Jeff and Bill Taylor, or either one of them, with force and arms, and

[1] Only so much of the case as discusses the question of causation is given.—ED.

against the consent of Lee Johnson, and upon express malice, wilfully compelled the said Lee Johnson to leave a place of safety, if any, and with force and arms knowingly compelled said Lee Johnson to go, against his will, to a place where, in case of resistance and perpetration of said offence of robbery, it was reasonably apparent to defendant and those acting with him that said Lee Johnson would naturally and necessarily be exposed to death, and likely lose his life; and you further believe that, knowing these natural, probable, and necessary consequences, if any, defendant or any other person, if any, acting with him, so compelled said Lee Johnson to be in such position, and that the placing of said Lee Johnson in such position, if any, was in pursuance of said conspiracy to rob, if any, and in furtherance and in aid thereof, and that while in said position R. E. Buchanan, in resistance to the perpetration of said attempted robbery, if any, did innocently shoot and kill said Lee Johnson on or about the 9th day of June, 1898, in Coleman County, Texas, not intending to do so, but actually intending to kill the parties attempting to perpetrate said robbery, if any, and that said killing was caused and directly brought about by the acts of defendant, or those acting with him, if any, in so compelling said Lee Johnson to be and remain in said position, — then you are instructed the defendant would be guilty of murder in the first degree, and you will so find in your verdict, and assess the punishment, as hereinbefore instructed. If you do not so believe, you will acquit." We think the above-copied charge very clearly presents the law applicable to the facts. Article 77, Penal Code, provides: "If any one, by employing a child or other person who cannot be punished to commit an offence, or by any means such as laying poison where it may be taken, and with intent that it shall be taken, or by preparing any other means by which a person may injure himself, and with intent that such person shall thereby be injured, or by any other indirect means cause another to receive an injury to his person or property, the offender by the use of such indirect means becomes a principal." In Blain *v.* State, 30 Texas Criminal Appeals, 702, Judge Hurt, delivering the opinion of the Court, said: "Again, if a person instigates or agrees with another to commit a crime, and the person so instigated commits a crime different from, but one likely to be caused by or become the reasonable result of, the crime intended, the instigator is an accessory before the fact, and, if present at its commission, is a principal thereto." Again, in Reddick *v.* Commonwealth (Kentucky), 33 Southwestern Reporter, 417, the court approved the following charge: "If the jury believe from the evidence, to the exclusion of all reasonable doubt, that accused wilfully, maliciously, and feloniously set fire to and burned the Miller Hotel, then being occupied by Mrs. Masters as a residence, and that by reason of that burning she lost her life, then the jury should find accused guilty of murder, although accused may not have intended or calculated the death of Mrs. Masters as the result of such burning." Commenting

upon the charge, the court say: "The instruction, we take it, embraces a great principle of law, and that the same is so uniformly held and acted upon in all criminal prosecutions as to need no special citation of authorities." Now, applying the principle laid down in the foregoing authorities to the question before us, we find that appellant, together with several others, went to the scene of the homicide for the purpose of robbing the train; that they forced deceased to go with them, after stopping the train, down to the door of the express car, having been previously warned by the engineer that some one would probably commence shooting at them from the rear end of the car, where the passenger coaches were. Defendant, in his own statement as quoted above, admits knowledge of this, and that the same was communicated to him prior to the time Johnson was taken to the express car. Then certainly he would be responsible for the reasonable, natural, and probable result of his act, to wit, placing deceased in a place of danger, where he would probably lose his life. Therefore we think the court's charge as above copied was a clear and proper presentation of the law applicable to the facts upon the trial of this case. Taylor *v.* State, *ante*, p. 564.

We have carefully reviewed all of appellant's various assignments, and do not think any of them are well taken, but will say, in passing, we do not think the court erred in refusing to charge on circumstantial evidence, as strenuously contended by appellant. There appearing no error in the record, the judgment is affirmed.

Affirmed.

ANDREWS *v.* KINSEL.

SUPREME COURT OF GEORGIA, 1901.

[*Reported* 114 *Ga.* 390.]

LEWIS, J. Andrews & Co. sued Kinsel for $500 damages, making by their petition substantially the following case: The plaintiffs rented from the defendant a storehouse in the city of Columbus, in which they transacted a mercantile business; and it was the duty of the defendant, as the landlord of the plaintiffs, to keep the premises in good repair. The defendant also owned the storehouse adjoining that rented by the plaintiffs, a partition wall dividing the two stores. On a named day the defendant, by his agents and servants, entered his storehouse adjoining the plaintiffs' place of business for the purpose of making certain repairs thereon, and in making the repairs the partition between the two storehouses was removed, or partly removed, leaving the store of the plaintiffs exposed and unprotected; and upon leaving the place at night the defendant's agents and servants negligently and carelessly left open two rear windows in the store next to that of

the plaintiffs, thereby rendering it easy to effect an entrance into the plaintiffs' store through the rear windows and the opening in the partition. On the night in question a burglar or burglars did gain entrance to the plaintiffs' store in the manner described, and steal from the plaintiffs a large quantity of merchandise, to their damage as aforesaid. No notice was given to the plaintiffs that the partition had been removed or that the windows had been left open, and this, also, is alleged to have been negligence. The defendant filed a demurrer to the petition, which was overruled, and he also filed an answer, in which he denied liability, and denied that he had been negligent as alleged. The case went to trial, and, at the conclusion of the evidence for the plaintiffs, the court, on motion of defendant's counsel, granted a nonsuit. To this ruling the plaintiffs excepted, and the defendant filed a cross bill of exceptions in which he assigned error upon the overruling of his demurrer.

1. As, in our opinion, the court below should have sustained the demurrer filed by the defendant, and the refusal to do so was reversible error, the writ of error issued upon the main bill of exceptions will, under the ruling of this court in Rives v. Rives, 113 Ga. 392, be dismissed.

2. It is unnecessary to argue, or to cite authorities to sustain, the well-settled legal principle that, to enable one to recover for damages resulting from the negligent conduct of another, it must appear that the negligence of the defendant was the proximate cause of the injury sustained. It is also a well-recognized principle that where there has intervened between the defendant's negligent act and the injury an independent illegal act of a third person, producing the injury, and without which it would not have happened, the latter is properly held the proximate cause of the injury, and the defendant is excused. 8 Am. & Eng. Enc. Law (2d ed.) 580. As is stated in 1 Shear. & R. Neg. (5th ed.) § 25, "The defendant's negligence may put a temptation in the way of another person to commit a wrongful act by which the plaintiff is injured, and yet the defendant's negligence may be in no sense a cause of the injury." Thus, in Tennessee, a defendant was held not liable for the negligent failure to keep a night watchman on guard over the property of the plaintiff, as a result of which an incendiary set fire to the property. State v. Ward, 9 Heisk. 133. In New York it is held that the relation of cause and effect between the negligence of the defendant and the injury to the plaintiff cannot be made out by including the independent illegal acts of third persons, and that the defendant cannot be made accountable for the unauthorized illegal acts of other persons, although his own conduct may have indirectly induced or incited the commission of the acts. Olmstead v. Brown, 12 Barb. 662. And in Crain v. Petrie, 6 Hill, 524, the following language is used: "To maintain a claim for special damages, they must appear to be the legal and natural consequences arising from the

tort, and not from the wrongful act of a third party remotely induced thereby." See, also, Shugart *v.* Egan, 83 Ill. 56; Bosworth *v.* Brand, 1 Dana, 377; Carpenter *v.* Railroad Co., 13 App. Div. 328, 43 N. Y. Supp. 203. This principle is also well established in Georgia by the cases of Belding *v.* Johnson, 86 Ga. 177, and Henderson *v.* Coal Co., 100 Ga. 568. In the former case it was held that a widow could not recover damages of a barkeeper for the homicide of her husband, who was killed in an encounter with a third person; the quarrel leading up to the encounter having been the result of intoxication produced by liquor illegally sold to the slayer of plaintiff's husband by the barkeeper. In the Henderson Case the lessee of a convict was held not liable for the criminal act of the convict, by which a third party suffered damage, although the lessee negligently placed it in the power of the convict to commit the crime. These cases, it will be seen, are closely in point. The rule is aptly and rather quaintly stated in Whart. Neg. (2d ed.) § 134, in the following language: "I am negligent on a particular subject-matter as to which I am not contractually bound. Another person, moving independently, comes in and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces." Applying these principles to the case now before us, it is manifest that the plaintiffs did not make out a cause of action by their petition. Granting as true all of their allegations as to the negligence of the defendant, it is also true, upon the face of their pleadings, that there intervened as a direct cause between the negligence of the defendant and the damage sustained by themselves the independent criminal act of a responsible human agency. The demurrer to the petition should have been sustained.

Writ of error on main bill of exceptions dismissed. Judgment on cross bill reversed. All the justices concurring.

HENDERSON *v.* DADE COAL CO. 209 Ga 2

SUPREME COURT OF GEORGIA, 1897.

[*Reported* 100 *Ga.* 568.]

LUMPKIN, P. J. The declaration now under review discloses one of the very saddest cases with which it has ever been our fortune to deal. The plaintiff, Miss Maggie Henderson, was, at the hands of a brutal convict, subjected to injury, wrong, and agony, both mental and physical, a recital of which would make one of the darkest pages in our reports. Every member of this bench was deeply moved and affected

by the account which the declaration gives of her blighted life. There is not, perhaps, in the annals of litigation, a story of wrong which appeals more pathetically for human sympathy. Were we to follow the instincts of our hearts, we would be under the strongest impulse to sustain the plaintiff's action; but as magistrates, under the solemn duty of enforcing what we conscientiously believe to be the law of the case, we are compelled to hold that the trial court did not err in sustaining the various demurrers alleging that no cause of action was set forth. Omitting any mention of numerous questions the decision of which is not, in the view we take of the case, in the least degree essential to its determination, we shall confine ourselves to a very brief discussion of the propositions announced in the headnotes, from which the nature of the case, so far as now material, will be readily apprehended. The case, at last, depends upon the question, whether the custodians of such a convict as is described in the third headnote are legally responsible in damages for the consequences of crimes committed by him while at large, and in the unrestrained control of his own movements, by their permission, or because of their negligence in failing to keep him safely confined.[1] We have no doubt that, as a general rule, a criminal tort committed by such a convict would be too remote a consequence of his keepers' misconduct in the premises to render them responsible to the person injured. While cases may arise in which this general rule should be varied — as where it appears that the custodians of the convict were in some way connected with the perpetration of the tort, or had reasonable grounds for apprehending that it would be committed — nothing is alleged in the present declaration to bring this case within such an exception. The direct and proximate cause of the injuries inflicted upon Miss Henderson was the independent action of the convict himself. He, though vicious, brutal, and infamous, was nevertheless an accountable human agent. While, according to the plaintiff's averments, he was not restrained by any convictions of right and wrong, nor governed by any principles of morality, the declaration does not attempt to allege that he was not a rational person, fully amenable to the laws both of God and of man. That he

[1] That a "felony" convict, about thirty-seven years old, who had been continuously in the penitentiary for about twelve years and who had five times escaped therefrom, was "a man in robust and vigorous health, immoral, brutish, devilish, of vicious habits, of violent passions, prone to desire for sexual intercourse," and a person "not restrained by any convictions of right and wrong, or governed by any principles of morality," and that "all of these conditions and things" concerning him "were well known and were understood" by his custodians, "or ought to have been, because of what they knew of his said person, history, character and surroundings," did not, without more, afford such cause for apprehending that he would, when an opportunity occurred, commit the crime of rape upon an unprotected woman, as to subject his custodians to liability in damages for the perpetration by him of this offense at a time when, because of their fault, he was at large and in the unrestrained control of his own movements.

was prone to a desire for sexual intercourse did not, by any means, render him an exception to a law of nature which universally prevails in the animal kingdom, whether as applied to human beings or animals of lower orders. Vile as this man was, it cannot be held that the defendants could reasonably have anticipated that he would, upon the first opportunity, assault and ravish any defenseless woman whom he might encounter. He was equally liable to commit some other heinous crime; and they were not bound to presume that he would commit any crime at all. The State requires the lessees of convicts, at the expiration of their terms, to furnish them transportation to the counties in which they were convicted. Thus the law clearly contemplates that these criminals shall be set at liberty in the very communities whence they came. It can hardly be questioned that scores, perhaps hundreds, of convicts, just as bad as the one now under consideration, are, from time to time, set at large by the law's command. If there was reason to apprehend that convicts of this depraved type would, upon regaining their liberty, commit such crimes as that complained of in the present case, it would seem that the true policy of the law would be to keep them imprisoned during their lives. That such is not the policy of the law is due to the fact that reason for apprehending such outrages does not really exist.

The true rule applicable in a case like the present was recognized and stated by this court in the case of Perry *v.* Railroad, 66 Ga. 751, wherein it was said that, in order to entitle a party to recover damages on account of the negligence of another, it should appear that the damages were the natural and proximate result of such negligence; "for, should it appear that, but for the intervention of a responsible third party, the defendant's negligence would not have caused damage to the plaintiff, then the defendant is not liable to plaintiff, for the reason that the causal connection between negligence and damage is broken by the interposition of an independent, responsible human action." In support of this doctrine, Judge Stewart, who presided in the place of Chief Justice Jackson, disqualified, cited Field, Dam., §§ 13, 32, 52, 53, 78; Wayne, Dam., § 25; Whart. Neg., § 134; Wait, Act. & Def. tit. "Damages." It is true that in the case just cited the action was based upon a tort of an altogether different character, but the principle announced controls the case at bar. The case of Belding *v.* Johnson, 86 Ga. 177, also has some bearing upon the question at issue, it being there held that the death of the plaintiff's husband, who was killed by a man under the influence of liquor, who, when in this condition, was violent and dangerous, was not occasioned by the act of a barkeeper who had furnished liquor to the slayer when he was already drunk, and had failed to protect the deceased from the homicidal assault made upon him in the barkeeper's place of business. Although the latter violated a penal statute of this State in so furnishing the liquor, it was, in effect, held that he was not bound to

anticipate that this unlawful conduct on his part would result in a homicide. A somewhat similar question was dealt with in Shugart *v.* Egan, 83 Ill. 56. There the person furnished with the intoxicating liquors was himself, in consequence of abusive language used to another, assaulted and killed. In a sense, the furnishing of the liquor was an indirect cause of his death, but the court held it was not the efficient and proximate cause. In a case decided by the Supreme Court of Minnesota (Swinfin *v.* Lowry, 34 N. W. 22) it appeared that a minor person of the age of 18, upon invitation of the defendants, drank intoxicating liquors with them and their friends at divers saloons several times during the same evening, some of the liquor being ordered and paid for by the defendants themselves. "He became intoxicated and quarrelsome, and committed an assault upon plaintiff, resulting in serious injury to him," but "was not incited thereto by the defendants, and it was his own voluntary act. In an action against them by the plaintiff for damages, on the ground that the assault was the result of their acts in furnishing the liquor supplied to the minor," the reviewing court held "that the damages were too remote, and were not to be deemed the natural and proximate result of the alleged wrongful acts of the defendants." A case which, upon its facts, is still more closely in point, is that of Hullinger *v.* Worrell, 83 Ill. 220. It was there held that a sheriff who negligently permitted the escape of a prisoner in his custody under an indictment for an assault with intent to murder was not liable in damages for the consequences of a subsequent assault by the escaped prisoner upon the same person upon whom the indictment in question charged that the original assault had been committed. This decision was based explicitly upon the proposition that the act of the prisoner, after regaining his liberty, was not the natural and probable consequence of the escape. Cases more or less resembling the foregoing are quite numerous, but it would not be helpful to multiply citations on this line. The rule of law that damages arising *ex delicto* are not recoverable unless they spring from the negligence or misconduct of the defendant is as well settled as any legal principle. The difficulty arises in its application to given cases. We have been unable to find any case precisely like the present, but our minds have, without difficulty, reached the conclusion that none of the lessees of penitentiary convicts named as defendants can be made liable for the crime committed in this instance. Nothing they did or omitted was its efficient or proximate cause. It was the independent act of another, not standing in any relation to the defendants which would render what he did imputable to them. The court below was right in sustaining the demurrers and dismissing the action.

Judgment affirmed.

HULLINGER v. WORRELL.

SUPREME COURT OF ILLINOIS, 1876.

[*Reported* 83 *Ill.* 220.]

PER CURIAM. This was an action of trespass on the case, brought by the plaintiff against the defendant, sheriff of the county of Whiteside. The declaration contained two counts.

The first set up that defendant, as such sheriff having in his lawful custody one Gardner Barker, under an indictment for an assault with a deadly weapon upon the plaintiff, with an intent to do him a great bodily injury, negligently suffered said Barker to escape from his custody, and that afterwards Barker, being at large, made a further assault upon plaintiff, and threatened to take his life, and that plaintiff, for his safety, was compelled to procure Barker to be bound over to keep the peace, about which plaintiff incurred expense and sustained damage, for which he brings his suit.

The second count sets up that defendant, having Barker in his custody as aforementioned, discharged him out of his custody and incited him to commit an assault upon the plaintiff, for which assault and threats to commit a further one, plaintiff was compelled to make complaint and have Barker bound over to keep the peace, by means whereof plaintiff suffered loss in a large sum of money. The court below sustained a demurrer to the declaration, and the plaintiff appealed.

Neither count of the declaration shows any cause of action in the plaintiff. He was not a party to the criminal proceeding under which Barker was held in custody, and permitting the escape from such custody was no legal injury to the plaintiff. The subsequent assault by Barker upon plaintiff, and the procuring him to be bound over to keep the peace, were not the natural and probable consequences of permitting him to escape from custody; nor was such escape from custody the proximate cause thereof. See City of Rockford v. Tripp, 83 Ill. 247. If a charge of trespass by the defendant may be made out of the second count, this form of action would not lie therefor, the suit having been commenced in 1871, and judgment rendered in 1872, before the passage of the act of 1874 abolishing the distinction between the actions of trespass and trespass on the case.

The judgment is affirmed.

not in 2d ed

THUBRON v. DRAVO CONTRACTING CO.

SUPREME COURT OF PENNSYLVANIA, 1913.

[*Reported* 238 *Pa.* 443.]

STEWART, J. The plaintiff sought in this action to recover for the loss of two horses which were killed under the following circumstances. The horses had been in the care and custody of the owner's servant, who was leading them at night time through a public street in the city of Pittsburg, on the way to the stable where usually kept. The evidence shows clearly that, either through the negligence of the servant, or because of unexplained fright, they escaped from the control of the servant and ran in the direction in which they were being led, but too far for their own safety. In continuing straight on after a certain point had been reached, they were not following the route on which they would have been led, but one which ended a short distance beyond on the bank of the Allegheny River. There had been a bridge at this point, but it was being removed by the city through defendant as contractor for the work. No sufficient barriers at the terminus of the street on the bank existed, and in consequence, the horses being without control, when they reached this terminus, plunged over a high embankment into the river and were killed by the fall. The sole question in the case is what was the proximate cause of the accident? The defendant's negligence in failing to erect barriers on the embankment may be conceded, but liability for plaintiff's loss does not result therefrom, except as such negligence was the proximate cause. Mere concurrence of one's negligence with the proximate and efficient cause of the disaster will not create liability. But for the escape of the horses from the control of the party in charge the accident would not have happened. For that escape defendants of course were not liable. Our own cases leave us in no doubt as to the correct rule to be applied where such conditions as these presented here exist. It should first be observed, that the measure of duty with respect to the maintenance of barriers on the river embankment was neither more nor less than the duty that would have rested on the city had it undertaken the work of removing the bridge otherwise than through a contractor. It follows that the cases we cite are none the less governing because of the fact that in each the negligence charged was failure on the part of a municipality to maintain the highway in a reasonably safe condition for public travel. Beginning with Jackson Township *v.* Wagner, 127 Pa. 184, and repeated in Schaeffer *v.* Jackson Township, 150 Pa. 145, Willis *v.* Armstrong County, 183 Pa. 184, Nichols *v.* Pittsfield Township, 209 Pa. 240, and others which might be cited, we have uniformly held that dangers which a runaway horse may encounter in his erratic course are not such

as the municipality is bound to provide against; its duty in this respect being measured alone by reasonable regard for the safety of the ordinary traveler, himself exercising reasonable care and prudence. Whenever in any of our cases a municipality has been held liable for damages resulting through a frightened horse, it has appeared as a fact that the horse took fright at a point on the highway where it was in unsafe condition, and the disaster followed as an immediate consequence. This is a clear distinction between cases of this character and cases like the one we are now dealing with, and nowhere is this distinction more clearly recognized and explained than in Schaeffer *v.* Jackson Township, *supra*. Heydrick, J., delivering the opinion there, says: "It is a general rule as well settled as anything in the law of negligence that a man is responsible for such consequences of his fault as are natural or probable, and might therefore be seen by ordinary forecast, but if this fault happen to concur with something extraordinary, and therefore not likely to be foreseen, he will not be answerable for the extraordinary result. The rule applies in actions against municipalities and quasi municipal corporations as well as to natural persons and private corporations. The concurrence of that which is ordinary with a party's negligence does not relieve him from responsibility for the resultant injury. Examples of such concurrence may be found in cases where by reason of causes known to the public authorities horses are likely to become frightened and in their sudden fright plunge over an unguarded precipice, or rush upon some danger in the highway for the existence of which the authorities are responsible. In such cases the consequences of the neglect of duty are natural and probable and therefore ought to be foreseen. But when, from extraordinary causes, for the existence of which the supervisors are not responsible and of which they cannot be presumed to have had notice, a driver loses control of his horses and they come in contact with a defect in the highway, there is no more reason for holding the township answerable for a resultant injury than there is for holding any other party responsible for the result of the concurrence of something which he could not foresee with his negligence." Further on in the opinion he says, referring to several cases of similar import, "These judgments require no vindication. They are logical deductions from the rule of law which must be invoked by every plaintiff who seeks redress for an injury received through the negligence of another. The injury must have been the natural and probable result of the defendant's negligence. But the cases must be rare in which an injury can be said to be the result of the negligence of a party when there is another and primary efficient proximate cause, wholly independent of such negligence and for which the party charged with negligence is in no way responsible. In such cases it would be incumbent on the plaintiff to show that the accident would have happened without the concurrence of the primary efficient proximate cause." The full significance of what was here said

can only be understood as the facts of the case are known. That was a case when a horse, hitched to a vehicle, took fright at a donkey, drawing a cart loaded with tin cans, and ran way, wrecking one of the wheels, which dragged upon the ground until it reached a hole, negligently left in the highway, when the occupants were thrown out and injured. It was held, reversing the judgment in the court below, that the proximate cause of the injury was the fright of the horse which was not caused by any neglect of the township. As in that case, so in this, the escape of the horses from control of the party in charge was the efficient, primary, and proximate cause, and for which no responsibility rested on the defendant; and this being so, the plaintiff would be entitled to recover from the defendant only as the case showed that the accident would have happened without the concurrence of such primary cause. The case showed just the contrary, that had they remained in control of the servant they would not have taken the road leading to the precipice. The case cited is authority for the rule that when there are two efficient, independent, proximate causes of an injury sustained on a highway, the primary cause being one for which the party charged with negligence is not responsible — here the frightening and escape of the horses — and the other being a defect in the highway, the injury must be referred to the former and not to the latter. As shown by Mr. Justice Heydrick in his opinion the rule here applied is one which has received general recognition. To the cases he cites from other States we may add that of Davis *v.* Inhabitants of Dudley, 4 Allen, 557, as not only recognizing the rule above asserted, but as suggesting quite another difficulty in the way of the plaintiff's recovery. In the case we cite the accident occurred in this wise. The plaintiff was driving his sleigh upon the highway when, because of a secret defect, the bolt connecting the cross bar and thills with the sleigh broke and let them fall upon the heels of the horses, whereupon the horse became frightened and having got detached from the sleigh and loosened from the control of the driver, ran about thirty rods, in a straight course, and there struck a pile of wood lying partly within the traveled portion of the way and broke his leg. The action was for the injury to the horse. From the opinion in this case we quote the following: "Here the accident and injury were not coincident, but were separate and were produced by separate causes. The effect of the accident as a procuring cause was complete when the horse, frightened by the falling of the cross tree and thills upon his heels, became detached from the sleigh and had escaped from the control of the driver. The blind violence of the animal, acting without guidance or direction, became, in the course and order of incidents which ensued, the supervening and proximate cause of the injury inflicted by his running against the wood pile, which constituted an unlawful obstruction and defect in the highway. In this succession of events, it happened that the accident placed the owner in a situation where it was out of his power to exercise the care over the

horse while this new cause was in operation, and until it had contributed to produce the disaster by which his leg was broken. The accidental breaking of the bolt was a personal misfortune, the direct consequence of which was all to be borne by the plaintiff himself. It is one of those consequences, that it disables him from recovering compensation for the loss and damage resulting from the injury to his horse, because having lost all opportunity and power of using, it was impossible for him to prove that he did use due and ordinary care to prevent it; and therefore since he cannot establish this indispensable preliminary fact, he can maintain no action against the defendant, although the defect in the highway for which the town was responsible was the immediate cause of it." In the present case the primary, efficient cause of the accident was the escape of the horses from control; whether this happened through the carelessness of the party in charge or through fright at some object is immaterial. However this may be, the series of occurrences that led to the injury began with the escape; the running away followed in consequence of the escape, and the plunging over the precipice resulted from the running away. After the horses had broken away from the servant they were free from his control and direction and pursued their own way. There being no opportunity for the exercise of due care by the servant to avoid the accident after the escape, proof of the indispensable preliminary fact was rendered impossible. The case last cited develops the reason on which must rest the general rule, that municipalities are under no obligation to keep their highways in such condition that damage may not be caused thereon by horses which have escaped from the control of their driver or are running away. The rule as we have stated it appears in the text of Dillon on Municipal Corporations, Sec. 1015. The authorities supporting are given in an extensive note thereto.

The case called for binding instructions for the defendants and it was therefore error to refuse defendant's third point.

The judgment is reversed.

SOUTH SIDE PASSENGER RAILWAY CO. *v.* TRICH.

SUPREME COURT OF PENNSYLVANIA, 1887. 255-712

[*Reported* 117 *Pa.* 390.]

On April 5, 1882, Mrs. Trich and her father, Mr. John W. McCully, when at the corner of Third and Smithfield Streets, Pittsburg, hailed a street car coming up Third just as it reached Smithfield Street. The cars in use were what are commonly called "bob-tails," having a driver but no conductor, with an ordinary platform and rail at the rear end, approached by steps on either side. The car started off rapidly when Mrs. Trich had one foot on the platform and the other on the

step, with her hand holding the rail; and as it reached the middle of Smithfield, Mrs. Trich not yet having entered, the driver whipped up suddenly to avoid a collision with a runaway horse and carriage seen to be coming down Smithfield. The abrupt motion communicated to the car threw Mrs. Trich from the platform, and just as she alighted she was struck by the runaway and severely injured.[1]

GREEN, J. There is no manner of question as to what was the actual and immediate cause of the injury inflicted upon Mrs. Trich. It was an entirely undisputed fact that she was struck and injured by a runaway horse and buggy. All the witnesses who saw the occurrence so testify. Thus, Mr. McCully, the father of Mrs. Trich, who was present with her at the time and was examined on her behalf, after describing her attempt to get on the car and saying that she was bounced off, adds: "A moment or two afterwards here comes a runaway horse and buggy down the street, and the shaft, I suppose it was, caught her under the arm and dragged her to the street crossing and she fell away." The only other witness examined for the plaintiffs as to the facts of the occurrence, M. M. Herrington, testified: "There is a banking building there on the corner, and I saw the lady fall — fall off — and when she fell, to the best of my knowledge she kind of threw herself back this way and there was a phaeton or buggy of some kind running — a horse running down the street with a buggy — and it struck her, and they picked her up and carried her into Mr. Johnson's drug store." There was no contradiction of this testimony. But one other witness, Mrs. Vrailing, examined by the defendant, testified to the fact of the injury and she also said it was done by the buggy striking the woman.

The learned court below, in the charge, said: "The evidence seems to me to preponderate very largely in favor of the fact that the immediate force which caused the injury to this woman was the runaway horse." This was an understatement of the testimony which might have led the jury to suppose that there was an open question, with a preponderance of evidence only, as to whether it was the runaway horse and buggy which inflicted the injury. The defendant had presented a point stating that it was the undisputed evidence that Mrs. Trich was injured by being struck by a runaway horse, so that the question was directly before the court. In view of that circumstance we think the court should have specifically so charged and not left it as an open question for the jury to determine, with a mere expression of opinion that the evidence preponderated in that direction.

Assuming then, as we do, that it was the undisputed evidence that the injury was inflicted by the runaway horse and buggy, the only remaining question is whether it was the duty of the court to declare whether this was the proximate cause of the injury. The point presented by the defendant asked for such an instruction, but the court

[1] The statement of evidence is omitted. — ED.

refused it, saying it was a question for the jury under the evidence. In this we think there was error. In the case of West Mahanoy v. Watson, 112 Pa. 574, we reversed the court below for making just such an answer to just such a point; and upon a review of the facts of the case we held that they did not constitute an instance of proximate cause as against the defendant, and therefore decided that the defendant's point should have been affirmed, which took the case from the jury. Mr. Justice Paxson, in delivering the opinion, said: "While it is undoubtedly true as a general proposition that the question of proximate cause is for the jury, yet it has been repeatedly held that where there are no disputed facts the court may determine it. It is sufficient to refer to Hoag v. The Railroad Co., 85 Pa. 293. In that case this court, following Railroad v. Kerr, 62 Pa. 353, and Railroad Co. v. Hope, 30 Pa. 373, laid down the rule as to proximate cause as follows: "In determining what is proximate cause the true rule is that the injury must be the natural and probable consequence of the negligence; such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act."

Applying this rule to the facts of the present case, can it be said that the injury of Mrs. Trich was the natural and probable consequence of the car driver's negligence in urging his horses to a faster gait? We think not. There was not a particle of evidence to show that runaway horses and vehicles were frequently, or indeed ever, seen upon Smithfield Street where this accident occurred. There was no evidence upon that subject. It was certainly not a natural consequence of a person being upon that street that he would be struck by a runaway horse. Nor is there the slightest reason for saying that it would be a probable consequence. The utmost that can be said would be, that such a consequence might possibly happen. But things or results which are only possible cannot be spoken of as either probable or natural. For the latter are those things or events which are likely to happen and which for that reason should be foreseen. Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency or regularity as to become a matter of definite inference. To impose such a standard of care as requires, in the ordinary affairs of life, precaution on the part of individuals against all the possibilities which may occur, is establishing a degree of responsibility quite beyond any legal limitations which have yet been declared. We are of opinion that in the facts of the present case the direct and immediately producing cause of Mrs. Trich's injury was her being struck by a runaway horse and buggy over which the defendant company had no sort of control and for which it is not responsible; and therefore we conclude that the proximate cause of the injury in the legal sense, was the collision of the horse and buggy with the person of Mrs. Trich and not the negligence of the defendant.

The case of West Mahanoy v. Watson came again into this court and is reported in 116 Pa. 344. The present Chief Justice, in delivering the opinion of the court, said: "These facts narrow the case down to the single question, was the upset at the ash-heap on the township road the immediate or direct cause of the loss of the horses? As we have seen, the facts themselves answer this interrogatory in the negative and necessarily determine the case in favor of the plaintiff in error. In the case of Hoag v. Michigan Southern & Lake Shore Railroad Co., 85 Pa. 293, Mr. Justice Trunkey, then president of the Common Pleas of Venango County, in his charge to the jury on the trial of the above-named cause, said: 'The immediate and not the remote cause is to be considered. This maxim is not to be controlled by time or distance, but by the succession of events. The question is, did the cause alleged produce its effect without another cause intervening, or was it to operate through or by means of this intervening cause?' As the principle here stated was adopted by the affirmance of this court following Pennsylvania Railroad v. Kerr, 62 Pa. 353, we may regard it as the settled law of this State."

In the facts of the present case we find a perfect illustration of this principle. Mrs. Trich herself testified that when she was "bounced" from the car she fell on her feet. Immediately after, she was struck by the runaway horse and buggy and from them received her injury. The jolting from the car simply landed her on her feet and inflicted no injury. But another agency intervened, which was entirely independent of any act of the defendant, and that agency alone inflicted the injury in question. Following the doctrine of the last case cited we feel clearly obliged to hold that the plaintiff's injury was inflicted by the special intervening agency stated, and therefore the defendant is not liable. In all the cases cited, as in several others not referred to, this court finally determined them upon its own view of the facts without regard to the verdicts of the juries. The defendant's point should have been affirmed.

Judgment reversed.

MANGAN v. ATTERTON.

COURT OF EXCHEQUER, 1866.

[*Reported L. R. 1 Ex. 239.*]

APPEAL from the Staffordshire County Court at Lichfield.

The plaintiff sued for injury caused to him by a machine of the defendant, under the following circumstances. The defendant, who is a whitesmith at Sheffield, was accustomed on market days to expose goods for sale in the public street; and on the day of the accident he exposed amongst them a machine for crushing oil-cake, unfenced and

without superintendence. The machine was turned by a handle on one side of it, and on the other side the cogs which worked the crushing rollers were exposed; the handle might have been, but was not, secured by wire. The plaintiff, a boy of four years old, was coming past the machine from school, in company with his brother, of the age of seven years (to whose charge his mother had entrusted him), and with other lads; and whilst one of the lads was turning the handle, the plaintiff, by the direction of his brother, put his fingers in the cogs, which so crushed them as to make their amputation necessary.

The county court judge directed the jury that if they thought the machine was dangerous, and one that should not have been left unguarded in the way of ignorant people, and especially children, without, at all events, the handle being removed or fastened up and the cogs thrown out of gear, they should hold the defendant liable for such damages as they might think right.

The jury inspected the machine, and gave a verdict for the plaintiff, damages 10*l*. The defendant appealed.

MARTIN, B. Even if the defendant was guilty of any negligence in placing the machine where it was, as to which I say nothing, his act was too remote a cause of the mischief to make him liable. The accident was directly caused by the act of the boy himself.

BRAMWELL, B. The defendant is no more liable than if he had exposed goods colored with a poisonous paint, and the child had sucked them. It may seem a harsh way of putting it, but suppose this machine had been of a very delicate construction, and had been injured by the child's fingers, would not the child, in spite of his tender years, have been liable to an action as a tortfeasor? This shows that it is impossible to hold the defendant liable. But further, I can see no evidence of negligence in him. If his act in exposing this machine was negligence, will his act in exposing it again be called wilfully mischievous? If that could not be said, then it is not negligence, for between negligence and wilful mischief there is no difference but of degree.

Pigott, B., concurred.

Judgment for the defendant.

LANE v. ATLANTIC WORKS.

183 Ld 2

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1872.

[*Reported* 111 *Mass.* 136.]

TORT. The declaration was as follows: "And the plaintiff says that the defendants carelessly left a truck, loaded with iron, in Marion Street, a public highway in Boston, for the space of twenty minutes and more; and the iron on said truck was so carelessly and negligently placed that it would easily fall off; and that the plaintiff was walking

in said highway, and was lawfully in said highway, and lawfully using said highway, and in the exercise of due care; and said iron upon said truck was thrown and fell therefrom upon the plaintiff in consequence of the defendant's carelessness, and the plaintiff was severely bruised and crippled," &c. The answer was a general denial of the plaintiff's allegations.

At the second trial in the Superior Court, before Devens, J., after the decision reported in 107 Mass. 104, the plaintiff introduced evidence that the defendants left a truck with a bar of iron on it standing in front of their works on Marion Street, which was a public highway in Boston; that the iron was not fastened, but would easily roll off the truck; that the plaintiff, then seven years old, and a boy about the same age named James Conners, were walking, between six and seven in the evening, on the side of Marion Street opposite the truck and the defendants' works; that Horace Lane, a boy twelve years old, being near the truck, called to them to come over and see him move it; that the plaintiff and Conners said they would go over and watch him do it; that they went over accordingly; that the plaintiff stood near the truck to see the wheels move, as Horace Lane took hold of the tongue of the truck; that Horace Lane moved the tongue somewhat; that the iron rolled off and injured the plaintiff's leg; and that neither the plaintiff nor Conners touched the iron or truck at all.

The plaintiff was also allowed to introduce in evidence, against the defendants' objection, an ordinance of the city of Boston prohibiting trucks or vehicles of any kind, whether loaded or unloaded, and whether with or without horses, from stopping in any street more than five minutes without some proper person to take care of the same, or more than twenty minutes in any case.

The defendants introduced evidence tending to show that the iron was fastened securely on the truck, which was drawn from the defendants' works into the street at four o'clock in the afternoon; that the boys removed the fastenings; that Horace Lane placed the boys one on each side of the truck; that he turned the tongue of the truck around; that he and Conners then took hold of the iron and rolled it off; that the plaintiff had his hands on the iron or on the truck when the iron rolled off on to him; and that the boys were engaged in the common enterprise of rolling off the iron and moving the truck. There was no evidence that Horace Lane had any lawful purpose or object in moving the truck, or any right to meddle with it.

The defendants requested the judge to give, besides other rulings, the following:

"1. Leaving the truck in the street, in violation of a city ordinance, might subject the defendants to a fine, but this violation of the provisions of the ordinance would not of itself alone render the defendants liable civilly in this suit; but negligence must be shown, and such, and only such, as is averred in the declaration.

"2. In order to make the plaintiff a participator or joint actor with Horace Lane, in his conduct in meddling with the truck for an unlawful purpose, it was not necessary for him to have actually taken hold of the tongue, or the iron, or the truck, to help or aid in moving it. It is enough if he joined with him in a common object and purpose voluntarily, went across the street on his invitation for that avowed purpose, and stood by the truck to encourage and aid, by his presence, word or act, the accomplishment of that purpose.

"3. While it is true that negligence alone on the part of Horace Lane, which contributed to the injury combining with the defendants' negligence, would not prevent a recovery, unless the plaintiff's negligence also concurred as one of the contributory causes also; yet, if the fault of Horace Lane was not negligence, but a voluntary meddling with the truck or iron, for an unlawful purpose, and wholly as a sheer trespass, and this culpable conduct was the direct cause of the injury which would not have happened otherwise, the plaintiff cannot recover."

The judge did not give the ruling requested, but gave rulings, which, so far as they are now material, were as follows:

"The city ordinance is proper to be put in evidence and to be considered by the jury upon the question of negligence, although it is not conclusive proof that the defendants were in point of fact negligent in the act of leaving the truck there. It is a matter of evidence, to be weighed with all the other evidence in the case.

"If the sole or the direct cause of the accident was the act of Horace Lane, the defendants are not responsible. If he was the culpable cause of the accident, that is to say, if the accident resulted from the fault of Horace Lane, they are not responsible. But if Horace Lane merely contributed to the accident, and if the accident resulted from the joint negligence of Horace Lane in his conduct in regard to moving the truck and the negligence of the defendants in leaving it there, where it was thus exposed, or leaving it so insecurely fastened that this particular danger might be reasonably apprehended therefrom, then the intermediate act of Horace Lane will not prevent the plaintiff from recovering, provided he himself was in the exercise of due and reasonable care. If the plaintiff himself participated in the act of Horace Lane no further than to go there and be a witness to this transaction which Horace Lane proposed to perform, crossing over the street by his invitation, and witnessing him move this truck, that would not make him such a participator in the wrongful act of Horace Lane as to prevent his recovery, provided he himself was in the exercise of reasonable care.

"If, however, he was actually engaged in the wrongful act of Horace Lane, if he was actually engaged in disturbing this truck, and moving the fastenings which had been put upon it in order to prevent it from being disturbed, and was actively participating in the act of Horace Lane, then he cannot recover. But if the act of the plaintiff was limited to crossing the street for the purpose of witnessing the act done

by Horace Lane, in answer to his invitation, and no active participation was taken by the plaintiff other than that, it would not prevent his recovery, provided he himself was in the exercise of due and reasonable care."

At the close of his charge to the jury the judge read the second ruling prayed for by the defendants, and said: "If the plaintiff took an active participation in it, as I before instructed you, or went there as a joint actor, for the purpose of encouraging Horace Lane in it, he cannot recover. If he went there attracted by curiosity only, at the invitation of the party who was about to move the truck, Horace Lane, then he may recover; provided, you are further satisfied that, in what he did, he was in the exercise of the due and reasonable care that should be expected of a person of his age."

The jury returned a verdict for the plaintiff for $6,000, and the defendants alleged exceptions.

COLT, J. In actions of this description, the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended.

The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise.

Whether in any given case the act charged was negligent, and whether the injury suffered was, within the relation of cause and effect, legally attributable to it, were questions for the jury. They present oftentimes difficult questions of fact, requiring practical knowledge and experience for their settlement, and where there is evidence to justify the verdict, it cannot be set aside as matter of law. The only question for the court is, whether the instructions given upon these points stated the true tests of liability.

Most of the instructions which were requested by the defendants as to their fault, the plaintiff's exercise of due care, and the burden of proof, were given in substance. The defendants now make only three objections:

1. The court was asked to rule that a violation of a city ordinance would not of itself alone render the defendants liable in this suit; but that negligence must be shown, and such negligence as is averred in the declaration. The jury were plainly told on this point, that the negligence charged must be proved, and that a violation of the city ordinance was not conclusive proof of it; that it was a matter of evidence to be considered with all the other evidence in the case. This was

sufficiently favorable to the defendants. The city ordinance was enacted for the purpose of rendering the streets more safe and convenient for travelers. In determining whether a particular use of a street was negligent, the jury might properly consider the legitimate uses to which the streets are devoted. Wright *v.* Malden & Melrose Railroad Co., 4 Allen, 283.

2. The rule of law stated to the jury, as to what was necessary to make the plaintiff a participator with Horace Lane in the unlawful act of meddling with the truck or its fastenings, is not materially different from the instructions asked. The jury were first told, in substance, that if the plaintiff did no more than go across the street by Horace Lane's invitation, and witness the transaction, he would not be a participator in the wrongful act so as to prevent a recovery; but if he actually moved the truck or its fastenings, or actively participated in the act, he could not recover. At the close of the charge, in connection with the defendants' request on this point, which was read to them, the jury were further told that if the plaintiff went there as a joint actor, for the purpose of encouraging Horace Lane, he could not recover, but might recover if he went attracted by curiosity only and by invitation of Horace Lane. The point now made is that these instructions are limited to the purpose for which he crossed the street, and do not meet a case where the plaintiff joined in the mischief after he got there, and was standing by for the purpose of aid and encouragement, ready to help if needed. But the instructions with the defendants' request, taken together, are not fairly open to this objection; the jury could not have been misled as to the true rule, and must have found that he was a mere spectator. Brown *v.* Perkins, 1 Allen, 89, 97. Miller *v.* Shaw, 4 Allen, 500.

3. The last instruction asked was rightly refused. Under the law as laid down by the court the jury must have found the defendants guilty of negligence in doing that from which injury might reasonably have been expected, and from which injury resulted; that the plaintiff was in the exercise of due care; that Horace Lane's act was not the sole, direct, or culpable cause of the injury; that he did not purposely roll the iron upon the plaintiff; and that the plaintiff was not a joint actor with him in the transaction, but only a spectator. This supports the verdict. It is immaterial whether the act of Horace Lane was mere negligence or a voluntary intermeddling. It was an act which the jury have found the defendants ought to have apprehended and provided against. McDonald *v.* Snelling, 14 Allen, 290, 295. Powell *v.* Deveney, 3 Cush. 300. Barnes *v.* Chapin, 4 Allen, 444. Tutein *v.* Hurley, 98 Mass. 211. Dixon *v.* Bell, 5 M. & S. 198. Mangan *v.* Atherton, L. R. 1 Ex. 239. Illidge *v.* Goodwin, 5 C. & P. 190. Burrows *v.* March Gas Co., L. R. 5 Ex. 67, 71. Hughes *v.* Macfie, 2 H. & C. 744.

Exceptions overruled.

28772

GLASSEY v. WORCESTER CONSOLIDATED STREET RAILWAY CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1904.

[*Reported* 185 *Mass.* 315.]

MORTON, J. These two cases were tried and have been argued together. At the close of the plaintiffs' evidence in the Superior Court the presiding judge ruled at the defendant's request that the plaintiffs could not recover and directed verdicts for the defendant. The cases are here on exceptions by the plaintiffs to these rulings.

The case of the plaintiff Rachel, who is a married woman, is for injuries alleged to have been received by her in consequence of the negligence of the defendant in leaving a large reel by the side of or in Cameron Street in Clinton, which some boys rolled down the street and which struck the carriage in which the plaintiff was driving and threw her out and caused the injuries complained of. The other action is by the husband for the loss of consortium and the expenses incurred by him because of the injuries to his wife.

The evidence would have warranted a finding, and for the purposes of these cases we assume that such was the fact, that the reel belonged to the defendant and had had feed wire upon it which had been strung upon its poles by persons in its employ. But it is not clear whether the reel was left on a vacant piece of land just outside the limits of the highway, or whether it was left within the location of the highway. We assume as most favorable to the plaintiffs that it was left within the limits of the highway. The uncontradicted testimony shows, however, that it was left outside the traveled portion of the highway lying on its side in the grass in a secure position. The plaintiffs introduced in evidence a by-law of the town forbidding persons to leave obstructions of any kind in the highway without a written license from the road commissioners or other board having charge of the streets, and they contend that, if the reel was left within the location of the highway when forbidden by the by-law, that of itself constituted such negligence as renders the defendant liable. But the most, we think, that can be said of this contention is that the leaving of the reel within the limits of the highway was evidence of negligence, not that in and of itself rendered the defendant liable or should be held as matter of law to have contributed directly to the accident. Hanlon *v.* South Boston Horse Railroad, 129 Mass. 310. The question is whether in leaving the reel lying on its side in the grass near the road the defendant ought reasonably to have anticipated that children passing along the street on their way to school, or for other purposes, would take it from the place where

it had been left, and engage in rolling it up and down the street, and that travelers on the highway would thereby be injured. The question is not whether a high degree of caution ought to have led the defendant to anticipate that such a thing might possibly occur, but whether it ought reasonably to have been expected to happen in the ordinary course of events. In the former case the defendant would not be liable, and in the latter it might be held liable, notwithstanding an active human agency had intervened between the original wrongful act and the injury. The case of Stone *v.* Boston & Albany Railroad, 171 Mass. 536, furnishes an illustration of the former class of cases, and the case of Lane *v.* Atlantic Works, 111 Mass. 136, of the latter.

It is clear that the plaintiff Rachel was in the exercise of due care. But assuming that the reel was left in the highway and that that was some evidence of negligence, we think that such negligence was the remote and not the direct and proximate cause of the plaintiff Rachel's injury. The material facts with the inferences to be drawn from them are not in dispute, and in such a case the question of remote or proximate cause is one of law for the court. Stone *v.* Boston & Albany Railroad, 171 Mass. 536, 543. McDonald *v.* Snelling, 14 Allen, 290, 299. Hobbs *v.* London & Southwestern Railway, L. R. 10 Q. B. 111, 122. The defendant's servants left the reel in a secure position lying on its side in the grass outside the traveled part of the street, and not in immediate proximity to it. As the reel was left it was entirely safe. It was not possible for a slight or accidental movement to set it in motion so as to injure others, as in the case of Lane *v.* Atlantic Works, *ubi supra*. The reel was large and cumbersome and required active effort on the part of a number of children to move it, from the place where it had been left, on to the traveled part of the highway, and set it in motion. And in order to injure the plaintiff or any other traveler on the highway it was necessary that it should be set in motion at a time when the plaintiff or other travelers were passing along the highway. In other words, in order to render the defendant liable, it must appear, not only that it should have anticipated that in the ordinary course of events school children would take the reel from the position where it had been securely left outside the traveled part of the road, but that they would set it in motion on the highway under such circumstances that it was liable to injure a traveler thereon. It seems to us that, conceding that there was evidence of negligence on the part of the defendant in leaving the reel where its servants did, they could not be required to anticipate that this would happen in the ordinary course of events, and, therefore, that the negligence was too remote. See Speake *v.* Hughes (1904), 1 K. B. 138.

Exceptions overruled.

DANNENHOWER v. WESTERN UNION TELEGRAPH CO.

SUPREME COURT OF PENNSYLVANIA, 1907.

[*Reported* 218 *Pa.* 216.]

FELL, J. An unused telegraph wire, which it was alleged belonged to the defendant or was under its control, fell across an electric light feed wire of the Northern Electric Light Company. The telegraph wire had been connected with a call-box which had been removed some months before the accident. The wire had fallen three or four weeks before. One end of it extended down so near the pavement that children reached and played with it; the other end was wrapped around an iron pole. The deceased was a trimmer in the employ of the electric light company, and was killed by an electric shock while engaged in placing carbons in a lamp attached to the pole.

A reversal of the judgment for the plaintiff is asked on the grounds (1) that there was no sufficient evidence that the telegraph wire belonged to the defendant or was under its control; (2) that the falling of the wire was not the proximate cause of the accident; (3) that the presence of the wire and the danger because of its contact with the electric light wire must have been known to the deceased as he ascended the pole.

That the wire was controlled by the defendant was not questioned at the trial, and while there was no direct proof of its ownership, there was proof that it had been connected with a Western Union call-box, and the defendant put in evidence a blue print, made the day after the accident, on which the wire was marked "W. U. Telegraph wire." This by way of admission supplied any defect in the formal proof of ownership. There was evidence that children had been pulling on the loose end of the telegraph wire and that the electric light wire on which it rested had sagged and there were burned marks on the frame of the lamp. Sparks had been emitted by the telegraph wire two weeks before the accident. Two theories of the cause of the accident were advanced at the trial. That of the plaintiff was that the deceased came in contact with the telegraph wire which had been charged by its contact with the electric light wire; that of the defendant that he came in contact with the frame of the lamp which was charged from the electric wire which had been pulled down and brought in contact with it. If the latter theory were correct, it would not follow that the defendant was relieved of responsibility, because it was its wire that either caused the sagging of the electric light wire by dragging it down or was the means by which children drew it down. The latter was a consequence to be foreseen and guarded against and it did not break the causal connection between the defendant's negligence and the injury. A neg-

ligent act may be the proximate cause of an injury although not the sole nor immediate cause, where the intervening act is set in motion or induced by the negligent act and the consequence is one that should have been foreseen. In Marsh *v.* Giles, 211 Pa. 17, relied on by the appellant, the injury to the plaintiff was caused by the unrelated act of a third party and was not a probable consequence of the defendant's wrongful act.

The questions of proximate cause under the conflicting testimony and of contributory negligence were properly submitted. As to the latter there was no evidence that the deceased had not taken reasonable care to avoid every danger, knowledge of which could be imputed to him.

The judgment is affirmed.

BINFORD *v.* JOHNSTON.

1887 Ind

SUPREME COURT OF INDIANA, 1882.

[*Reported* 82 *Ind.* 426.]

ELLIOTT, J. The case made by the appellee's complaint, briefly stated, is this: Two sons of appellee, Allen and Todd, aged twelve and ten years respectively, bought of the appellant, a dealer in such articles, pistol cartridges loaded with powder and ball. The boys purchased the cartridges for use in a toy pistol, and were instructed by appellant how to make use of them in this pistol; the appellant knew the dangerous character of the cartridges, knew the hazard of using them as the boys proposed, and that the lads were unfit to be entrusted with articles of such a character; shortly after the sale, the toy pistol, loaded with one of the cartridges, was left by Allen and Todd lying on the floor of their home. It was picked up by their brother Bertie, who was six years of age, and discharged, the ball striking Todd and inflicting a wound from which he died.

A man who places in the hands of a child an article of a dangerous character and one likely to cause injury to the child itself or to others, is guilty of an actionable wrong. If a dealer should sell to a child dynamite, or other explosives of a similar character, nobody would doubt that he had committed a wrong for which he should answer, in case injury resulted. So, if a druggist should sell to a child a deadly drug, likely to cause harm to the child or injury to others, he would certainly be liable to an action.

The more difficult question is whether the result is so remote from the original wrong as to bring the case within the operation of the maxim *causa proxima, et non remota, spectatur*. It is not easy to assign limits to this rule, nor to lay down any general test which will enable courts to determine when a case is within or without the rule. It is

true that general formulas have been frequently stated, but these have carried us but little, if any, beyond the meaning conveyed by the words of the maxim itself.

The fact that some agency intervenes between the original wrong and the injury does not necessarily bring the case within the rule; on the contrary, it is firmly settled that the intervention of a third person or of other and new direct causes does not preclude a recovery if the injury was the natural or probable result of the original wrong. Billman *v.* Indianapolis, etc., R. R. Co., 76 Ind. 166 (40 Am. R. 230). This doctrine remounts to the famous case of Scott *v.* Shepherd, 2 W. Black. 892, commonly known as the "Squib case." The rule goes so far as to hold that the original wrongdoer is responsible, even though the agency of a second wrongdoer intervened. This doctrine is enforced with great power by Cockburn, C. J., in Clark *v.* Chambers, 7 Cent. L. J. 11; and is approved by the text-writers. Cooley Torts, 70; Addison Torts, section 12.

Although the act of the lad Bertie intervened between the original wrong and the injury, we cannot deny a recovery if we find that the injury was the natural or probable result of appellant's original wrong. In Henry *v.* Southern Pacific R. R. Co., 50 Cal. 176, it was said: "A long series of judicial decisions has defined proximate, or immediate and direct damages to be the ordinary and natural results of the negligence; such as are usual and as, therefore, might have been expected." Lord Ellenborough said in Townsend *v.* Wathen, 9 East, 277, that "Every man must be taken to contemplate the probable consequences of the act he does." In Billman *v.* Indianapolis, etc., R. R. Co., *supra*, very many cases are cited declaring and enforcing this doctrine, and we deem it unnecessary to here repeat the citations. Under the rule declared in the cases referred to, it is clear that one who sells dangerous explosives to a child, knowing that they are to be used in such a manner as to put in jeopardy the lives of others, must be taken to contemplate the probable consequences of his wrongful act. It is a probable consequence of such a sale as that charged against appellant, that the explosives may be so used by children, among whom it is natural to expect that they will be taken, as to injure the buyers or their associates. A strong illustration of the principle here affirmed is afforded by the case of Dixon *v.* Bell, 5 M. & S. 198. In that case the defendant sent a child for a loaded gun, desiring that the person who was to deliver it should take out the priming. This was done; but the gun was discharged by the imprudent act of the child, the plaintiff injured, and it was held that the defendant was liable. In Lynch *v.* Nurdin, 1 Q. B. 29, the doctrine of the case cited was approved, and the same judgment has been pronounced upon it by other courts as well as by the text-writers. Carter *v.* Towne, 98 Mass. 567; Wharton Neg. 851; Shearman & Redf. Neg., 3d ed., 596.[1]

[1] The remainder of the opinion is omitted. — Ed.

CHADDOCK *v.* PLUMMER.

SUPREME COURT OF MICHIGAN, 1891.

[*Reported* 88 *Mich.* 225.]

MORSE, J. Plaintiff brought this suit in the Berrien Circuit Court to recover damages for the loss of his right eye, which was destroyed by a shot from an air-gun in the hands of a boy named Roscoe Tabor. The Circuit Judge directed a verdict for the defendant.

The facts proven are substantially as follows: During the last of July or first of August, 1890, the defendant bought an air-gun, and gave it to his son, Harry Plummer, a lad aged about nine years. Defendant also bought at the same time some shot, such as are used in air-guns. Defendant cautioned his son to be careful in using the gun. The shot were all used in about two days, and some time later defendant bought his son more shot, which were used in half a day. No other shot were bought or furnished by the defendant, or by his order, or with his knowledge. Mrs. Plummer, the wife of the defendant, bought her son Harry some shot, which he also fired, except four shot, by one of which plaintiff was injured. On the morning of the accident, September 3, 1890, Harry fired the shot bought by his mother, except the four shot, and put the gun in the storm house, which was a part of the dwelling, and then put the four shot on a tablecloth, and went to school. Mr. Plummer was not at home. The Tabor boy came there with some rutabagas, and began looking and traveling about the premises, and found the gun in the storm house, and then asked Mrs. Plummer for some shot, and she handed him the four shot which Harry had left on the table. She directed him to shoot at the hen-coop in the rear of the house. The boy fired one shot at the hen-coop, one at an apple tree, and then he went around to the north side of a new house, which Mr. Plummer was building, to a point about a rod east of the front of the new house, and eight or ten feet north of it. The boy was facing the west, and the street was to the west of him, and the street runs northwest and southeast. He put a grape on a plank, and looked to see if anyone was in the street, and, seeing no one, he held the muzzle of the gun about two and one half feet from the grape, and the gun was pointed down, and fired. The distance west to the street from where the boy was when he shot is from seventy to one hundred feet. Mr. Chaddock at the time the shot was fired was standing in the street, looking at this new house of the defendant. The shot glanced from the board, and struck him in the eye, destroying it. The street was a frequently traveled highway in the village of Benton Harbor, then containing about 3700 inhabitants, and at a point where defendant had long re-

sided. Defendant's boy Harry was nine years of age when the gun was purchased, and the Tabor boy was ten years old when the shot was fired. The gun was the common make of toy air-gun for children, breaking in the middle for the insertion of the shot, and, when closed again, operating with a spring, compressing the air and expelling the shot. The shot used were "BB," or "double B." Harry was told by his father not to lend the gun to other boys, as they might break it. The Tabor boy lived out in the country, and occasionally visited at defendant's. It does not appear that the defendant knew of the purchase of shot by his wife, or that his boy had used all the shot purchased for him by defendant.

The contention of the plaintiff is that the air-gun in question is a dangerous weapon, and that the defendant did not use sufficient care in the keeping of it upon his premises; that, at any rate, the question whether he did use such care or not should have been submitted to the jury. But, as the facts are, the defendant cannot be held responsible for the injury to plaintiff, unless it was negligence, sufficient to support this action, in buying the gun and allowing his son to use it. He cannot be considered negligent in any other respect. He cautioned his boy to be careful in its use, and no carelessness of his own son was shown at any time in his use of it. The defendant and his son were neither of them responsible in any way, except owning the gun, for the use of it by the Tabor boy. It was kept inside the house, for the storm door was an inclosure. If it came into the hands of Tabor through the negligence of anyone, it was the negligence of the wife, for which the defendant is not liable.

This air-gun may be a dangerous weapon in a certain sense. The shot fired from it will not penetrate clothing, but it will put out the eye of a person, and will kill small birds and some small animals. These guns are in common and everyday use by children; over four hundred of them were sold in one season by a dealer at Benton Harbor. But it is not more dangerous in the hands of children than a bow and arrow and many other toys. It would hardly be good sense to hold that this air-gun is so obviously and intrinsically dangerous that it is negligence to put it in the hands of a child nine years of age, and that such negligence would make the person so putting it in the hands of the child responsible for the act of another child, getting possession of it without defendant's consent or knowledge. Even if the gun had been left lying on the ground in the yard of the defendant, and the Tabor boy had picked it up outside the house, and used it, the defendant would not have been responsible for the damage done by the boy. An axe is considered a dangerous weapon, but if one leaves an axe by his woodpile, and a child comes into the yard, picks it up, and injures another with it, is the owner of the axe liable for damage because he has not put this deadly weapon under lock and key?

And if it be granted that this air-gun loaded is a dangerous weapon,

as is a gun loaded with powder and ball, would this fact make the defendant liable? I think not. Suppose a person, owning a shotgun, should put the same unloaded within the storm house of his door, and a neighbor's boy, 10 years of age, without the knowledge or consent of the owner, should pick up the gun, and obtain from the wife or some other member of the household a loaded cartridge, and take the gun out and discharge it, accidentally wounding someone, would the owner of the gun be responsible for the damage resulting to the injured person? To so hold him responsible would necessitate the keeping of unloaded firearms under lock and key, with the key in the possession at all times of the owner. This is not a case of leaving a torpedo or dynamite where it may be expected that children will find and play with it. An unloaded gun is harmless; a torpedo or dynamite is not, but is dangerous anywhere, and under all circumstances, to those not acquainted with the proper method of handling it, and liable to explode even in the hands of those who are expert in using it.

In my opinion, it was not negligence *per se* for the defendant to buy this toy gun, and place it in the hands of his boy nine years of age; and there were too many intervening causes without the act or knowledge of the defendant, between the buying of the gun and the injury, to hold the defendant liable for its use in this case. If his own son had, in any manner, contributed to the accident, a different question would arise, upon which I express no opinion.

The judgment must be affirmed, with costs.

The other justices concurred.[1]

PITTSBURG REDUCTION CO. v. HORTON.

1912

SUPREME COURT OF ARKANSAS, 1908.

[*Reported* 87 *Ark.* 576.]

THIS was an action brought by John A. Horton, by his next friend S. A. Horton, against the Pittsburg Reduction Company and C. C. Brazil, to recover damages for an injury sustained by him caused by the explosion of a dynamite cap in his left hand.

The cap which did the damage was picked up by Charlie Copple, a boy about 10 years of age, at the edge of the spur track near the end of the toolhouse of appellant company. The caps were in a tin snuff box and were made of brass or copper. They were very much like small metal cartridges and appeared to be empty except of dirt. The Copple boy picked them up on his way home from school and carried them home. He lived with his parents about one-fourth of a mile

[1] See also Harris v. Cameron, 81 Wis. 239. — ED.

distant. His father was an employee of another company, which had a plant for mining bauxite near that of appellant company. Charlie Copple kept the caps at home for about one week, playing on the floor with them in the presence of his parents. When he would leave them on the floor, his mother said she would pick them up. She said she did not know what they were. She said that Charlie Copple had them there in the house, and that she supposed her husband noticed him with them. The father denied knowing that his boy had the caps until he heard of it after the accident happened. Charlie Copple said that, when not playing with them, they were left on the clock shelf. About one week after he had found them, Charlie carried them to school and traded them to Jack Horton for some writing paper. Jack Horton was a boy 13 years old. He was in the schoolhouse at the time he was hurt. He said he thought it was a shell of a 22 cartridge that had been shot; that he was picking the dirt out of it with a match when it exploded and tore up his hand. His hand was torn so that it had to be amputated.

There is a great deal of testimony relative to the manner by which the caps came on the spur track, where Charlie Copple picked them up, but the view we have taken of the case renders it unnecessary to abstract it, except to say that it may be assumed that appellant C. C. Brazil, the general foreman of appellant company, threw them there from the toolhouse thinking they were empty.

There was a jury trial and a verdict against both appellants for $2,000. They have appealed to this court.

HART, J. (after stating the facts). It is a well-settled general rule that, when a defendant has violated a duty imposed upon him by the common law, he should be held to be liable to every person injured whose injury is the natural and probable consequence of the misconduct. Hence in our consideration of this case we are first met with the proposition of whether or not the negligence of appellants in leaving the dynamite caps near the spur track, which was frequented by children, was the proximate cause of the injury. As was said by this court in the case of Martin *v.* Railway Co., 55 Ark. 510, 19 S. W. 314, and later approved in the case of James *v.* James, 58 Ark. 157, 23 S. W. 1099, there must be a direct connection between the neglect of the defendant and the injury; that its connection must be something more than one of a series of antecedent events without which the injury would not have happened.

It is a well-settled general rule that, if, subsequent to the original negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the injury, the original negligence is too remote. The difficulty arises in each case in applying the principle to a given state of facts.

Counsel for appellee mainly rely upon the case of Harriman *v.* Pittsburg, C. & St. L. R. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St.

Rep. 507, to establish their contention that the negligence of the appellants in leaving the caps on the spur track was the proximate cause of the injury. Other cases are cited by them to sustain their position, but they chiefly turn upon the question of the contributory negligence of the plaintiff.

The facts and the gist of the holding of the court in the Harriman Case are fairly stated in the syllabus, which is as follows:

"A train of cars, passing over some signal torpedoes, left one unexploded which was picked up by a boy nine years old, at a point on the track which he and other children, in common with the general public, had long been accustomed to use as a crossing, with the knowledge and without the disapproval of the company. He carried it into a crowd of boys near by, and, not knowing what it was, attempted to open it. It exploded and injured the plaintiff, a boy 10 years of age. Held, that the act of the boy who picked up the torpedo was only a contributory condition, which the company's servants should have anticipated as a probable consequence of their negligence in leaving the torpedo where they did, and that that negligence was the direct cause of the injury suffered by the plaintiff."

There the child did a perfectly natural thing for a boy to do. He found what appeared to be an attractive plaything. He at once carried it over to his playmates and exhibited it to them. He then began to try to open it so that they might learn what it contained. In doing this the explosion occurred which caused the injury. The result was the natural sequence of antecedent events, and ought to have been anticipated by any person of ordinary care and prudence. In the present case, the facts are practically undisputed. Charlie Copple's father was an employee of a company engaged in a similar business to that of appellant company. Naturally, his avocation and the proximity of his residence to the mines made both himself and his wife familiar with the nature of explosives. True, Mrs. Copple says that she did not know what the shells contained, but she did know that they were shells for some kind of explosives, that her son brought them home, and that he played with them. She admits that, when he would leave them on the floor, she would pick them up and lay them away for him. This continued for a week, and then, with her knowledge, he carried them to school. Her course of conduct broke the causal connection between the original negligent act of appellant and the subsequent injury of the plaintiff. It established a new agency, and the possession by Charlie Copple of the caps or shells was thereafter referable to the permission of his parents, and not to the original taking. Charlie Copple's parents having permitted him to retain possession of the caps, his further acts in regard to them must be attributable to their permission and were wholly independent of the original negligence of appellants. This is but an application of the well-established general rule that, to charge a person with liability for damages, the

negligence alleged must be found to have been the proximate cause of the injury to the plaintiff.

This case has given us much concern, and we have reviewed many cases illustrating the application of the general rule. It is useless to review them, for most of them recognize and approve the general rule, and, as the facts in each case are different, a review of them would add nothing to the opinion. The leading cases on the subject are cited in the respective briefs of the attorneys in this case.

As above stated, the evidence speaking on the question is undisputed, and, having determined that the intervening act of Charlie Copple's parents in permitting him to retain in his possession the caps broke the causal connection between the original wrongful act of appellants and the subsequent injury of the plaintiff, there is nothing to submit to the jury.

The judgment is therefore reversed, and the cause dismissed.

Wood, J., not participating.[1]

19472

OLSON *v.* GILL HOME INVESTMENT CO.

SUPREME COURT OF WASHINGTON, 1910.

[*Reported* 58 *Wash.* 151.]

CROW, J. This action was commenced by Ernest Olson, a minor, by M. E. Olson, his guardian *ad litem*, against Gill Home Investment Company, a corporation, and Clark N. Gill, its president and manager, to recover damages for personal injuries. From a judgment in plaintiff's favor, the defendants have appealed.

The appellant Gill Home Investment Company was engaged in selling an addition to the city of Tacoma, and was itself owner of four unfenced lots therein, located at the intersection of two public streets. A small building constructed for toilet purposes was located on these lots, about one hundred and twenty-five feet from one street and thirty-nine feet from the other. A board screen or wall, about six feet high, was in front of the unlocked toilet door. Between the toilet and the nearest street was a small tool-house. Some weeks prior to the accident which caused respondent's injuries, the appellant corporation commenced the construction of a cement building, and Clark N. Gill, its president and manager, caused a box and several loose sticks of Hercules stumping powder (hereinafter called dynamite, a term used by the witnesses), to be removed from the tool house and stored on a shelf in the toilet, doing so to protect workmen who went into the tool house. The shelf was located on plates upon which the rafters rested, about six feet eight inches above the floor and five feet eight

[1] See also Pollard v. Oklahoma City Ry., 36 Okl. 96, 128 Pac. 300. — ED.

inches above the seat of the toilet. The toilet door was left unlocked. A pile of sand, attractive to children but designed for use in mixing concrete, was kept on appellants' lots near the toilet. A public school was about three blocks distant. Several residences, the homes of children, were located in the vicinity. A number of young school boys, including the respondent, were in the habit of playing upon appellants' lots. They occasionally visited and used the toilet, as did other persons, most of whom were appellants' employees. One of the boys, Wesley Depew, nearly fourteen years of age, discovered the box and loose sticks of dynamite and told his twin brother Leslie Depew of such discovery. On a Sunday prior to the accident, Leslie Depew, with two younger boys, went to the toilet and took a loose stick of dynamite which they hid under a stump. Wesley Depew had previously taken some dynamite caps and fuses which he says he found in the toilet. He exploded one of these caps and gave some of them to the respondent, who was then about thirteen years of age. On the day of the accident, Leslie Depew and two other boys, accompanied by respondent, took the dynamite, caps and fuse, to some vacant ground one-fourth of a mile distant, where respondent attached a cap and fuse to the stick of dynamite, and igniting it, unsuccessfully tried to explode it under a large stump. He then attempted to explode it with a lighted paper, but again failing, undertook to remove the cap by prying it from the dynamite with a stick. This produced an unexpected explosion which caused respondent to lose both of his hands.[1]

Appellants, citing many authorities, further contend that their negligence, if conceded, was not the proximate cause of the accident, but that the intervening criminal act of the boys in stealing the dynamite, caps and fuse, and their subsequent acts in attempting to explode the same, were the proximate cause. In an action for damages resulting from negligence, the defendant will be held liable for the natural and probable consequences of his negligent acts. To create such a liability the injury complained of must result from the negligence charged, which will not be considered as too remote if the resulting accident might have been reasonably anticipated. The act of an intervening third party, contributing to the injurious result of the original negligence, does not, in all cases, excuse the original wrongdoer. If such intervening act could, or in the exercise of ordinary prudence should, have been foreseen, the original act still remains the proximate cause of the injury. In this case it was for the jury to determine whether the appellants who carelessly and illegally stored, and it might be said abandoned, a dangerous explosive, should have anticipated that it might come into the possession of young boys who frequented the place, even though they were trespassers.

"In addition to the requirement that the result should be the natural

[1] Part of the opinion is omitted. In it the Court decided that the jury were justified in finding the defendant negligent.— ED.

and probable consequence of the negligence it is commonly stated that the consequence should be one which in the light of attending circumstances an ordinarily prudent man ought reasonably to have foreseen might probably occur as the result of his negligence." 29 Cyc. 493. See, also, Nelson *v.* McLellan, 31 Wash. 208, 71 Pac. 747, 96 Am. St. 902, 60 L. R. A. 793; Akin *v.* Bradley Engineering & Mach. Co., 48 Wash. 97, 92 Pac. 903, 14 L. R. A. (N. S.) 586; Wellington *v.* Pelletier, 173 Fed. 908; Mattson *v.* Minnesota etc. R. Co., *supra*; Powell *v.* Deveney, 3 Cush. 300, 50 Am. Dec. 738; Scott *v.* Shepherd, 2 W. Bl. 892; Englehart *v.* Farrant & Co., 1 Q. B. (1897) 240; Myers *v.* Sault St. Marie Pulp & Paper Co., 3 Ont. L. R. 600; Labombarde *v.* Chatham Gas Co., 10 Ont. L. R. 446; Clark *v.* Chambers, 3 Q. B. (1878) 327, 7 Cent. Law Journal 11; Lynch *v.* Nurden, 1 Q. B. 29; Illidge *v.* Goodwin, 5 C. & P. 190; Lake *v.* Milliken, 62 Me. 240, 16 Am. Rep. 456; Harriman *v.* Pittsburgh etc. R. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. 507; Lane *v.* Atlantic Works, 111 Mass. 136; Powers *v.* Harlow, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154; Mize *v.* Rocky Mountain Bell Tel. Co., 38 Mont. 521, 100 Pac. 971, 129 Am. St. 659; Fishburn *v.* Burlington & N. W. R. Co., 127 Iowa 483, 103 N. W. 481.

No two cases can be found which are identical, and there is an irreconcilable conflict of authority on this question, but we think the above mentioned cases, and many others that might be cited, announce correct principles of law applicable to the facts now before us. In Myers *v.* Sault St. Marie Pulp & Paper Co., *supra*, a workman employed by the defendants ascended a movable stepladder to work near the unguarded rim of a cogwheel. When he was about to descend, a truckman moved the ladder, causing him to fall on the unguarded wheel. The contention was made that the defendants' negligence in failing to guard the cogwheel as required by statute, and in failing to provide an immovable ladder, was not the proximate cause of the accident, but that the wrongful act of the truckman in moving the ladder was such proximate cause. The issue was submitted to the jury, and the appellate court, speaking through Armour, C. J. O., said:

"The jury having found that the injury to the workman was caused by the negligence of the defendants in no way guarding the wheel, and in not properly fastening the ladder to the floor, and this finding being, as I think, supported by the evidence, the next question is, did the intervention of the workman in wrongfully taking away the ladder relieve the defendants from the consequences of their negligence, and I think not, for the defendants' negligence still remained an operating cause of the workman's injury. According to what is said by Lord Esher and Rigby, L. J., in Engelhart *v.* Farrant & Co., [1897] 1 Q. B. 240, the question whether the negligence of the defendants was an effective cause of the workman's injury was a question for the jury, and if so, they have in effect determined it, by finding as they did in their

answers to the third and seventh questions submitted to them. And I think that the authorities show that the intervention of the workman in wrongfully taking away the ladder did not relieve the defendants from the consequences of their negligence."

In Labombarde *v.* Chatham Gas Co., *supra*, where plaintiff received an electric shock, the court said:

"But if the actual throwing of the loose guy wire over the other wires were the act of some passer-by, who thought to put it out of the way, or even of some mischievous urchin, it seems to me such a likely and probable thing to happen that it is not too remotely connected with the act of cutting the guy wire from its fastenings and leaving it loose on the ground to render those guilty of the latter negligence liable for the consequences which ensued though an independent agency had intervened as their immediate cause. The original negligence of the workmen of the defendant company was an effective cause of the injury to the plaintiffs. McDowall *v.* Great Western R. W. Co., [1902] 1 K. B. 618, [1903] 2 K. B. 331, 337-8."

The recent case of Wellington *v.* Pelletier, *supra*, is especially pertinent. There the defendant's employees had negligently left a number of cars standing on a spur track at the head of a grade, secured only by setting the brakes. They should have been further secured by fastening or blocking the wheels. Some children playing about the cars released the brakes, causing them to run down and kill defendant's employee, who was working in a trench between the rails of the spur. It was held that the intervening act of the children did not prevent the defendant's negligence from being the proximate cause of the accident. The court said:

"It is claimed that the interposition of the boys in this case was the interposition of a new efficient cause, which, if interposed, the law says eliminates the original cause. On the other hand, it has been thoroughly understood, since the leading case of Scott *v.* Shepherd, 2 W. Bl. 892, well known as the 'Squib Case,' that the interposition even of human beings, acting under circumstances which deprive them of periods for reflection, or known to be of classes which are ordinarily governed by unreasoning impulses, does not come within the class of responsible interventions referred to. This is illustrated in one direction by the Squib Case, and in the other direction by the well-known cases where young children, either through carelessness or inattention, have been intrusted with dangerous weapons. The general principle is sufficiently discussed in Pollock's Law of Torts (8th Eng. ed.) 45 *et seq.* The rule on which the plaintiff relies in this respect was authoritatively stated and applied by the Court of Appeal in 1896 in Engelhart *v.* Farrant, [1897] 1 Q. B. 240."

In this case it was for the jury to determine whether respondent and the other boys, considering their age, their experience, and their knowledge of right and wrong, were in their acts governed by unreasoning and

natural impulses. That the question of proximate cause was properly submitted to the jury, see: Milwaukee & St. Paul R. Co. *v.* Kellogg, 94 U. S. 469; Union Pac. R. Co. *v.* Callaghan, 56 Fed. 988; Denver etc. R. Co. *v.* Robbins, 2 Colo. App. 313, 30 Pac. 261.

Appellants make other assignments of error based upon instructions given and refused, but the foregoing discussion disposes of them adversely to their contention. The instructions given fully, fairly, and correctly stated the law, and properly submitted all issues of fact to the jury for their consideration.

It is contended that the criminal act of the boys in stealing the dynamite was such an independent, intervening act as to insulate the appellants' negligence and relieve them from liability. The question as to whether the boys fully understood the criminal import of their act was properly submitted to the jury and determined adversely to the appellants' contention, as was also the question of the contributory negligence of the respondent, he being of tender age. There was evidence tending to show that the boys, including respondent, did, to a limited extent, realize that dynamite was a violent explosive. They were trying to expode it; but the evidence further shows that they did not fully understand or appreciate all of its dangerous qualities. They supposed it could only be exploded by some method of ignition, and when they lit the fuse, they dodged behind large stumps for protection. It is evident, however, that they did not anticipate that any explosion could be produced in the manner in which it was produced. In the light of respondent's tender years, his limited knowledge, his lack of experience, and all of the facts and circumstances disclosed by the evidence, we cannot hold that he was, as a matter of law, guilty of such contributory negligence as to relieve the appellants from liability, but must hold that the question of his contributory negligence was an issue for the jury.[1]

JACOBS *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1912.

[*Reported* 212 *Mass.* 96.]

TORT by the administratrix of the estate of Stephen Otis Jacobs, junior, for the suffering and death of the plaintiff's intestate, a boy fifteen years of age, caused by the explosion of a railroad torpedo belonging to the defendant. The plaintiff's substituted declaration contained two counts, the first at common law for the conscious

[1] See also Victor *v.* Smilanich, 54 Colo. 479, 131 Pac. 392; Vills *v.* Cloquet, 119 Minn. 277, 138 N. W. 33; Harriman *v.* Pittsburgh Ry., 45 Oh. St. 11, 12 N. E. 451.—ED.

suffering of the plaintiff's intestate alleged to have been caused by the negligence of the defendant, its agents and servants in permitting the torpedo to come into the hands of the intestate, knowing that it was a dangerous explosive and unmarked in any way to indicate its character, and the second count under St. 1906, c. 463, Part I, § 63, for the death of the plaintiff's intestate, alleged to have been caused by the negligence of the defendant or by the unfitness or gross negligence of its servants or agents while engaged in its business. Writ dated March 12, 1908.

In the Superior Court the case was tried before Dubuque, J. Facts which could have been found upon the evidence are stated in the opinion. The explosion occurred on March 31, 1907, and the plaintiff's intestate died on April 9, 1907. There was evidence that on March 22, 1907, the intestate with other boys was waiting about the defendant's station at Rockland for the purpose of seeing off some high school scholars who were going to Washington, that while they were there a train stopped at the station and the baggage master upon it put off a piece of baggage and that when he did so the torpedo, which was described as a tin disk wholly unmarked, fell to the platform, that one Turner, one of the intestate's companions, who was between nine and ten years of age, picked up the torpedo and put it in his pocket, that after the train had gone Turner showed the disk to the other boys, that by shaking it they could hear something rattle and they tried to open it with their knives to find out what was inside, that on the following Sunday, March 24, the boys were together and Turner found the disk in his pocket and produced it and the boys again tried to open it without success, that on the Sunday after, which was March 31, the same boys were together after Sunday school, that Turner again found the disk in his pocket and the boys again tried to open it, and that finally Turner gave the disk to the plaintiff's intestate who put it on a stone and struck it with his right foot, when the explosion occurred. There was evidence that none of the boys knew that the disk was of a dangerous character.

At the close of the evidence, the defendant asked the judge to rule that upon the evidence the plaintiff was not entitled to recover either upon the first or the second count of her substituted declaration. The judge ordered a verdict for the defendant on each of the counts, and reported the case for determination by this court, with a stipulation of the parties which has become immaterial.

BRALEY, J. The injuries to the plaintiff's intestate which resulted in his death after a period of conscious suffering, were caused by the explosion of a railroad signal torpedo, the property of the defendant. It may be assumed, that the jury would have been warranted in finding upon the evidence the following facts: In the management of its business as a carrier of passengers, trains were provided with torpedoes, which whenever necessary were to be used by the flagman on the

train ahead, to warn trains approaching from the rear, that a preceding train not very far distant was passing over the same track. The warning consisted in the noise of the explosion, as the on-coming train struck the torpedo, which the flagman affixed to the rail by straps forming a part of the apparatus. To be effective, not only the torpedo must be exploded by contact with the train, but the detonation must be sufficiently great to attract the attention of trainmen. The jury properly could infer from these circumstances, and from the testimony of the plaintiff's expert as to the character of the composition with which it was charged, as well as from the rule promulgated by the company, which was introduced in evidence, that the defendant knew or by the use of due diligence should have known, that the torpedo contained a highly explosive compound. If exploded without proper precautions, or under extraneous conditions, pieces of the shell or case might fly with such force in various directions as to endanger the safety of persons in the vicinity. The use of a dangerous agency of this nature, which must be classed with gunpowder, and explosives like nitroglycerine, and dynamite in its various forms, while lawful, imposed upon the defendant the duty of taking every proper precaution to prevent personal injury to those lawfully upon the company's premises from explosions which might be precipitated through the carelessness of its servants. Derry *v.* Flitner, 118 Mass. 131; Oulighan *v.* Butler, 189 Mass. 287, 292; Dulligan *v.* Barber Asphalt Paving Co. 201 Mass. 227, 231.

The inquiry, accordingly, is whether the injury in question reasonably should have been anticipated by the defendant. Obertoni *v.* Boston & Maine Railroad, 186 Mass. 481. The train which came into the station where the intestate, a boy of fifteen years of age, and his young companions were waiting for the departure of friends, carried in the baggage car a torpedo to be used as a signal, which the jury could find was carelessly ejected by the defendant's baggage master and fell within the railroad location. The evidence having warranted a finding that the intestate was not a trespasser, it would follow that if from the impact of the fall or from the innocent intermeddling of bystanders whose presence might have been anticipated an explosion had followed, injuring him, the company as matter of law would not have been exonerated. Lucas *v.* New Bedford & Taunton Railroad, 6 Gray, 64; Bradford *v.* Boston & Maine Railroad, 160 Mass. 392; McKone *v.* Michigan Central Railroad, 51 Mich. 601; Illinois Central Railroad *v.* Hammer, 72 Ill. 347; Lane *v.* Atlantic Works, 111 Mass. 136.

But the defendant was not bound to foresee that one of the intestate's companions, actuated doubtless by a boy's impulse and curiosity in which apparently the intestate shared, to possess and explode the torpedo, would remove it almost immediately from the premises, and that after the lapse of ten days the experiment would be tried in the vicinity of their homes, and the intestate, who partici-

pated, would be fatally injured by the explosion. Denny v. New York Central Railroad, 13 Gray, 481; Quigley v. Cough, 173 Mass. 429, 430; Smith v. Peach, 200 Mass. 504; McDowall v. Great Western Railroad, [1903] 2 K. B. 331. The accident is deplorable, but the wrongful asportation which brought the intestate in contact with the exploding torpedo occasioned the mischief, and distinguishes the case at bar from Lane v. Atlantic Works, 111 Mass. 136, and the doctrine stated in Lebourdais v. Vitrified Wheel Co. 194 Mass. 341, 344. The injury not having been caused by its negligence, the presiding judge correctly ruled that there could be no recovery under either count, and in accordance with the terms of the report judgment must be entered for the defendant on the verdicts.

So ordered.

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HOLLIDGE v. DUNCAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1908.

[*Reported* 199 *Mass.* 121.]

MORTON, J. While the plaintiff was looking into a shop window on Washington Street, he was struck by the pole or tongue of a dump cart owned by the defendant, and loaded with gravel and standing in the street parallel with the sidewalk, or by the plate glass falling from the window broken by the pole, and received the injuries complained of. The horses had been unhitched from the cart, and the pole "was sticking up in the air" as a witness described it. In answer to written interrogatories from the plaintiff, the defendant stated that the cart was out of order and that the driver was trying to fix it and asked a bystander to assist him; that "the bystander took hold of a blanket which was caught between the seat and the sweep of the cart and jerked it to get it free, and as he did so the perch broke and the pole swung around over the sidewalk and hit a window, breaking the glass, some of which fell on a person standing near." The accident was described in substance as follows by a person who was passing along the street and saw it: "he noticed that the robe was caught under the sweep and that somebody came along and pulled it; that the cart lurched and the pole went a little higher and then suddenly swung around over the sidewalk and fell against the window smashing it. He saw the plaintiff struck and fall. As the pole swung around the body of the cart fell down and appeared to be wholly disconnected." On cross-examination this witness said that he was not sure whether the pole struck the plaintiff, or the chains on it, or the falling glass, but he thought that it was the falling glass. There was nothing to show how long the cart had been out of order or what caused it to be out of order. The defendant did not call the driver as a witness and did not testify

himself and introduced no evidence. There was a finding for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the judge to give certain rulings which he requested.

The defendant contends in substance that the accident was caused by the jerking or pulling of the blanket by the bystander, and that he is not liable therefor because the driver had no authority to procure assistance from the bystander. But we think that the act of the bystander must be regarded as the act of the driver. The cart was out of order and the driver was trying to fix it as he was bound to do. For that purpose he asked the bystander to assist him. And in doing so he used the assistance of the bystander as he would have used a tool or appliance which he had procured, and which he must be regarded as having implied authority to procure under the circumstances. The fact that the tool or appliance was an intelligent human being does not affect the matter any more than the fact that another person held the reins did in Booth *v.* Mister, 7 C. & P. 66. The case is not one where the servant attempted to delegate his duty to another as in Gwilliam *v.* Twist, [1895] 2 Q. B. 84; but a case where the driver needed for a moment, in the performance of his duty in a sudden emergency, another hand, and found it in the assistance given at his request by a stranger, and what was done by the stranger was as if done by himself. See Althorf *v.* Wolfe, 22 N. Y. 355; Campbell *v.* Trimble, 75 Texas, 270; Bucki *v.* Cone, 25 Fla. 1; Pennsylvania Co. *v.* Gallagher, 40 Ohio St. 637; James *v.* Muehlebach, 34 Mo. App. 512.

Moreover the cart was out of order and the defendant offered no explanations as to how long it had been out of order or what caused it to be so. In the absence of such explanation the judge was warranted in finding that the cart would not have been out of order but for the defendant's negligence. And he could also find that its condition was a contributing cause of the accident. Lane *v.* Atlantic Works, 107 Mass. 104. In other words, he could find that, if it had not been for the condition of the cart, the action of the bystander in pulling out the blanket would not have caused the body of the cart to fall, as one of the witnesses testified that it did, and the pole to swing round over the sidewalk, thereby striking the plaintiff, or breaking the window so that he was injured by the falling glass. It is not necessary to render the defendant liable that he should have been able to foresee the precise manner in which the accident happened. It is enough if injury to another was reasonably to be apprehended as a result of his negligent conduct. Lane *v.* Atlantic Works, *ubi supra*. Feely *v.* Pearson Cordage Co. 161 Mass. 426. We see no error in the manner in which the judge dealt with the case.

Exceptions overruled.[1]

[1] See also Wells Fargo & Co. *v.* Zimmer, 186 Fed. 130; Harrison *v.* Kansas City E. L. Co., 195 Mo. 606, 93 S. W. 951.— Ed.

HARTON v. FOREST CITY TELEPHONE CO.

SUPREME COURT OF NORTH CAROLINA, 1907.

[*Reported* 146 *N. C.* 429.]

CONNOR, J. . . .[1] The case comes to this. The pole having fallen by reason of defendant's negligence, was lying on the ground, across the road, on Sunday. Carpenter and several others came along and put the pole back in the hole from which it had fallen by reason of the support being removed by the overseer of the road, and the rain. He and those with him, for the purpose of making it secure, went to a wood pile near by and got a pine stick or pole, of the size and length described by them, and propped the pole in the manner described. They propped it up to get it out of the way. They could have held it up and driven under it, as they did another pole not far away. Carpenter had no connection with and did not act in behalf of defendant. In less than an hour after Carpenter put the pole up, the plaintiff and his daughter, riding in a buggy and driving a mule, came along the road, and, just as they passed, without any suggestion of the immediate cause, other than inherent weakness in the support which it had, the pole fell, the mule ran and, in some way, immaterial in this connection, but difficult to understand, the daughter received a severe concussion of the brain, without being hit by the pole, became unconscious, and, in six weeks, died.

The question is thus presented, whether the act of Carpenter or the original negligence of defendant, in legal contemplation, was the proximate cause of the injury sustained by plaintiff's intestate. We think it manifest that Carpenter negligently — that is, insecurely — placed the pole in the hole from which it had recently fallen. The dangerous condition in which it was left by the overseer was the result of plowing near to it, removing or loosening the earth by which it was supported. This, followed by the heavy rain, caused the pole to fall. This was manifest to Carpenter. All of the evidence is to this effect. Carpenter and those aiding him recognized it by going to a wood pile and getting the pine stick with which to prop it. That it fell within a short time — less than an hour — shows that it was left by Carpenter in an insecure and dangerous condition. His motive — purpose — was doubtless to restore the pole and serve the defendant and its patrons, but the act was unauthorized. He could not impose upon defendant any new or different duty or liability from that which it assumed by its original negligence. If the pole had struck plaintiff's intestate when it fell the first time, or if, after being down across the road, she had, without contributory negligence, driven against it and been injured, the defend-

[1] Part of the opinion is omitted. — ED.

ant would have been liable. It was liable for all such damages as resulted or flowed in ordinary natural sequence from the negligent omission to repair the dangerous condition of the pole after a reasonable opportunity to do so; the reason being, as said by Pollock, probably the most accurate writer on the subject, "that a person is expected to anticipate and guard against all reasonable consequences of his negligence, but that he is not expected to anticipate and guard against that which no reasonable man would expect to occur." Torts, 40, citing Greenland *v.* Chaplin, 5 Ex., 248; Ramsbottom *v.* Railroad, 138 N. C. 38. Discussing this question, Mr. Justice Walker, in Drum *v.* Miller, 135 N. C. 204, quotes with approval the language of Judge Cooley: "When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through consequences resulting therefrom, this consequence must not only be shown, but it must be so connected, by averment and evidence, with the act, or omission, as to appear to have resulted therefrom, according to the ordinary course of events, as a proximate result of a sufficient cause." Cooley on Torts, p. 74. This principle would have been illustrated and applied if plaintiff's intestate had been injured by the first falling of the pole or by driving against it while down across the road. Carpenter's act introduces a new element in the case and renders it necessary for us to seek another principle by which to determine defendant's liability. It is manifest that, but for Carpenter's act, the pole could never have fallen upon plaintiff's intestate. So far as the dangerous condition of the pole, which imposed upon defendant the duty of securing it, was concerned, when it fell its power to injure by falling was exhausted. No one having been injured in the falling, the case was *damnum absque injuria.* The duty thus imposed upon the defendant was to remove the obstruction from the highway, and a failure to do this promptly, under the circumstances, rendered it liable for injuries sustained by any person traveling the highway. The pole was down across the highway by reason of defendant's negligence, because, for the purpose of this discussion, we eliminate the heavy rain as a causal element in producing the condition. Assuming that defendant knew the pole was in a dangerous condition and liable to fall, either with or without the heavy rain, it was fixed with notice that it had fallen — that is, that the probable result of its negligence had occurred. In this condition of the case we find a satisfactory statement of the law in Wharton on Neg. 138. He says: "Suppose that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to plaintiff? This question must be answered in the negative, for the general reason that causal connection between the negligence and damage is broken by the interposition of defendant's responsible human action. I am negligent on a particular subject-matter. Another person, moving independently, comes in and, either

negligently or maliciously, so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable."

The rule, as announced by Justice Strong, in Railroad *v.* Kellogg, 94 U. S. 469 (p. 475), is usually regarded as sound in principle and workable in practice. He says: "The question always is, Was there an unbroken connection between the wrongful act and the injury — a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, or wrongful act, and that it ought to have been foreseen in the light of attending circumstances."

In many of the cases found in the reports, in which it is claimed that intervening agencies have broken the causal connection between the wrong and the injury, it will be noted that the intervening agencies are either natural or conventional conditions, as when a house is negligently burned, whereby the fire is communicated to other houses more or less remote from the original, and winds or other natural causes have changed or controlled the course of the flames. Here the intervening agency is free, intelligent and independent, in the sense of a self-controlled person who interposes and changes the conditions which he finds existing when he enters upon the scene. The liability, if any exist, for his conduct is vicarious. Adopting either view of causation as the basis of liability — that of "natural and probable consequences," or "what ought reasonably to have been anticipated and guarded against"— we think the same conclusion follows in this case. Dr. Wharton says: "Reserving for another point the consideration of consequences resulting from the indefinite extension of vicarious liability, we may now ask whether, on elementary principles, the action of an independent, free agent, taking hold, *unasked*, of an impulse started by us and giving it a new course, productive of injury to others, does not make him the juridical starting point of the force so applied by him, so far as concerns the person injured. For the spontaneous action of an independent will is neither the subject of regular, natural sequence, nor of accurate precalculation by us. In other words, so far as concerns my fellow-beings, their acts cannot be said to have been *caused* by me, unless they are imbeciles or act under compulsion or under circumstances produced by me which gave them no opportunity for volition." This language excludes nonliability for the acts of one under compulsion by reason of conditions produced by the original

wrongdoer, as in the Squib case, the throwing of the squib by the intervening persons was for their protection from a danger to which the defendant gave the first impulse. They were not "free agents." Scott *v.* Shepherd, 2 Black, 892; 1 Smith L. C. 549. Of course, if Carpenter had been defendant's servant, acting within the scope of his employment, the liability would have attached, upon the doctrine of *qui facit per alium*, etc.

When the cause was before us on the other appeal, the majority of the Court conceded that Carpenter's act "intervened and was the efficient cause of the injury" (141 N. C. 462), but the doubt was expressed whether it was a "new and independent cause." Citing the language of Barrows on Negligence, it is said: "If, however, the cause — the intervening cause — be of such a nature that it would be unreasonable to expect a prudent man to anticipate its happening, he will not be responsible for damage resulting solely from the intervention." Conceding this to be true, we have in the evidence a striking illustration of the dividing line between liability and nonliability. Defendant knew that the pole was in a dangerous condition — that the probability of its falling was increased by rain. That it might rain was reasonably probable. Therefore, although the pole may not have fallen if it had not rained — and in a certain sense the "heavy rain" caused the pole to fall — yet, because it was an intervening cause which would naturally and ordinarily have occurred, and one which ordinary foresight ought to have "anticipated and guarded against," the defendant, by reason of its original negligence, is not permitted to escape liability upon the suggestion of broken causal connection between the "wrong and the injury." But can it be said that, in addition to this, it could have reasonably anticipated that Carpenter and his associates — a free, intelligent agent — coming along and seeing two poles down across the road, would lift up one and pass under it, and would undertake to put the other back in the hole from which it had just fallen, and, further, would go to a wood pile near by and get a pine stick with which to prop the pole? Can it be that all this on the part of Carpenter was a natural, orderly, usual sequence from the original negligence, or that his action was a subject of ordinary precalculation or foreknowledge? "Can we regard the independent action of intelligent strangers as something that is in conformity with ordinary natural law, or as something that can be foreseen or preascertained?" The fact that Carpenter disposed of the two poles in the same situation in an entirely different manner — lifting one up and passing under, and putting the other back in the hole — is a practical demonstration of the difficulty of following the argument of prevision to the length claimed by plaintiff. Assuming that defendant knew that the pole had fallen, is it reasonably probable that it would or could foresee that some one would come and negligently put it back in the hole, in plain view of its condition? It is an entirely reasonable conclusion that the first

traveler along the road would either push, pull or lift it out of his way, and if in doing so he left it in a dangerous condition, whereby plaintiff was injured, the case would come within the principle of Clark *v.* Chambers, 3 Q. B. D. 327; 47 L. J. Q. B. 427; 19 Eng. Rul. Cas. 28, relied upon by plaintiff. In that case defendant had obstructed the highway with a hurdle and two wooden barriers armed with spikes. Some one came along and removed one of the *chevaux-de-frise* hurdles from the place where it stood, and placed it across the footpath. Plaintiff, passing there in the dark, ran against it and was injured. The court held that defendant was liable. Pollock says that the decision, or, at least, the ground upon which it is put, is not in harmony with other cases. He says: "However, their conclusion may be supported, and may have been to some extent determined by the special rule imposing the duty of what is called 'consummate caution' on persons dealing with dangerous instruments." Torts, 49.

In Sharp *v.* Powell, 7 L. R. (1872), 253, Bovill, C. J., says: "No doubt, one who commits a wrongful act is responsible for the ordinary consequences which are liable to result therefrom; but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person." Pollock says: "Whether Chambers *v.* Clark can stand with it or not, both principle and the current of authority concur to maintain the law as declared in Sharp *v.* Powell." We have examined a number of decided cases in which the doctrine involved here is discussed. It is uniformly conceded that, while the principle is clear, the application is difficult, and variant combinations of fact render decided cases of but little value as authorities. When the facts are in controversy, or more than one conclusion of fact may be drawn, the question is submitted to the jury. When the facts are admitted, or found by the jury, and the conclusion is clear and certain, it is a question for the court.

After more than usual reflection and investigation, with the aid of exhaustive argument by able counsel, we are of the opinion that the defendant was entitled to have the court instruct the jury that, if they believed the evidence, they should answer the first issue "No."

We have not discussed the several instructions given by his Honor, because our opinion renders it unnecessary to do so. It is but just, however, to say that his Honor followed the rule laid down in the opinion of the Court. There was some difference in the testimony, to which sufficient weight was not given.

For the error pointed out, there must be a

New Trial.

WILDER v. STANLEY.

SUPREME COURT OF VERMONT, 1893.

[*Reported* 65 *Vt.* 145.]

Case for the negligence of the defendant. Heard upon the report of a referee at the September term, 1892, Thompson, J., presiding. Judgment for the plaintiff. The defendant excepts.

The plaintiff and defendant owned and occupied adjoining pastures. The colts of the plaintiff escaped from his pasture into the pasture of the defendant over a portion of the division line fence, which it was the duty of the defendant to maintain. From the defendant's pasture they passed into the pasture of one Willey. While there they started from some cause and ran back towards the pasture of the defendant, and in so doing one of them ran against the barbed wire fence between the pasture of Willey and that of the defendant, and severed the jugular vein, from which it died.

The referees found that at the time of the accident one Tracy was, without any authority from either the plaintiff or defendant, attempting to drive the colts from Willey's pasture into that of the plaintiff, and submitted an alternative finding; for the defendant, if the unauthorized act of Tracy was the legal cause of the injury; for the plaintiff, if the defective fence of the defendant was the cause of the injury.

Being directed to report that evidence upon which they based their finding that Tracy was attempting to drive the colts back to the pasture of the plaintiff, it appeared that Tracy himself was introduced as a witness, and testified that he saw the colts of the plaintiff in Willey's pasture playing with the colts of one Kendall, who owned an adjoining pasture, across the fence; that one of Kendall's colts kicked the top rail, and so started the colts of the plaintiff. Upon cross-examination he was asked if he did not soon after the accident say to several persons that he was at the time driving the colts back, which he denied. Thereupon these persons were inquired of, and testified that he had so stated to them; and this was the only evidence of the fact before the referees.[1]

Ross, Ch. J. The defendant contends that the referees have not found that the colt injured escaped over the defective portion of the division fence, which it was the duty of the defendant to maintain and keep in repair. This contention is not sustained by the report. They first find that at the time of the injury complained of the defendant's portion of the fence was insufficient at certain points described; then that, on September 20, 1888, the plaintiff's colts escaped from his pasture into the defendant's pasture, over or through the gap or break in the defendant's portion of the fence; and again, "If . . . the unlaw-

[1] See also Phillips v. Dewald, 79 Ga. 732, 7 S. E. 151. — ED.

ful and defective fence over or through which we find the plaintiff's colt passed on the 20th day of September, 1888, or a short time prior thereto," etc. The referees nowhere modify or change these findings, that the colt escaped over the defective portion of the defendant's fence wherever it did escape from the plaintiff's pasture, on that occasion. Subsequently in their report the referees find that no evidence showed how long before September 20, 1888, the colt escaped from the plaintiff's pasture, and that they cannot find the exact time prior when it did escape. Hence, the plaintiff's colt, which was killed on September 20th, 1888, was away from the plaintiff's pasture on that occasion through the negligence of the defendant, or his failure to discharge his duty to the plaintiff in maintaining his portion of the division fence in the manner required by law; and, as said by Smith, J., in Lee *v.* Riley, 18 C. B. N. S. (114 E. C. L. 722), cited with approval by this court in Tupper *v.* Clark, 43 Vt. 200, adapted to the facts of this case, it was through the defendant's negligence that the colt and barbed wire, causing its death, came together. The judgment of the county court was therefore correct, unless the facts found by the referees show that some other independent cause, disconnected with the negligence of the defendant, occasioned the death of the colt.

II. The defendant contends that the facts found in regard to the acts of Hiram Tracy show such an independent, disconnected cause. There are several sufficient answers to this contention. There was no legitimate evidence before the referees to show that Tracy started up or drove the colts. Tracy was not a party, and his declarations to the effect that he started up or undertook to drive the colts on the occasion, if established, were not evidence which the referees could lawfully use to establish the fact. He denied that he started up or drove the colts. All his declarations shown were in regard to what he was intending, or what he had done. They were not of the *res gestæ*, as they did not accompany and explain, or characterize his act of starting up or driving the colts. There was no other evidence tending to establish the fact that he started up or drove the colts on the occasion of the injury. If he did, it is not found that his act was negligently done. The colts had escaped through the negligence of the defendant. The plaintiff had the right to pursue and return them in a proper manner, or to employ Tracy to do so. He might not be able to catch and lead them back. He might be obliged to drive them in a prudent manner. If Tracy had been employed by the plaintiff — as he was not — to defeat the right of recovery, it must have been found, as it is not, that Tracy started or drove the colts negligently. The escape being through the negligence of the defendant, that negligence accompanied the colts while roaming, by reason of it, away from the plaintiff's pasture. Inasmuch as Tracy was not the servant of the plaintiff, if he voluntarily negligently started up or drove the colt at the time it was injured, Tracy's negligence would be concurrent with that of the defend-

ant in causing the death of the colt. In such a case both or either of the wrong doers are liable for the injury and damage caused by their concurrent negligence. Hence, this contention of the defendant is not maintainable.

Judgment affirmed.

TURNER v. PAGE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1904.

[*Reported* 186 *Mass.* 600.]

TWO ACTIONS OF TORT, one by a married woman for personal injuries, and the other by her husband for loss of consortium and expenses, and for injuries to the buggy in which the plaintiff in the first case was sitting when the accident occurred, alleged to have been caused by the negligence of the defendant's servant. Writs dated May 25, 1903.

At the trial in the Superior Court before Gaskill, J., it appeared that the plaintiff in the second case had gone into a bank on Central Street in Gardner, leaving his wife sitting in the buggy, when a pair of horses, attached to a tip cart belonging to the defendant and without a driver, ran into the buggy, the pole of the tip cart breaking the back of the buggy and throwing out the plaintiff in the first case; that the driver of the tip cart had left his horses standing eight or ten feet from a railroad track while he went back about six or eight feet to pick up a part of his load of stove wood which had dropped from the cart; that there was a switching engine shifting back and forth over the crossing, puffing and blowing; that the horses suddenly started and ran, the driver running after them in vain; that one Buffum tried to stop the horses by standing in front of them and holding up a wooden rake which he had in his hand; that when the horses came upon him he jumped aside hitting or touching the head of one of them with the rake; and that the horses somewhat changed their course and ran into the buggy standing by the sidewalk as above described.

At the close of the evidence the defendant asked the judge to make the following rulings:

"1. Upon all the evidence, the plaintiff is not entitled to recover.

"2. There is no sufficient evidence of negligence on the part of the defendant.

"3. There is no sufficient evidence of negligence on the part of the driver of the horses which ran away to warrant a recovery.

"4. If the horses which ran into the plaintiff would not have so collided and the injuries would not have occurred, except for the intervening attempt of Buffum to stop the horses, coupled with the blow with the rake over the head of the nigh horse, then the plaintiff cannot recover."

LORING, J.[1] The difficulty with the defendant's argument . . . in support of his exception to the refusal to give the fourth ruling asked for lies in the assumption that the persons who attempt to stop runaway horses will in fact act as the typical prudent man would act. We are of opinion on the contrary that among the natural and probable consequences of negligently letting a pair of horses run away it is competent to find that they will swerve to one side or the other on account of the acts of persons who try to stop them in a way which would not have been adopted by a prudent man, including waving a rake and hitting one of the horses over the head with it. The case comes within Lane *v.* Atlantic Works, 111 Mass. 136; Koplan *v.* Boston Gas Light Co., 177 Mass. 15; Boston Woven Hose & Rubber Co. *v.* Kendall, 178 Mass. 232; Murray *v.* Boston Ice Co. 180 Mass. 165; see also Clifford *v.* Atlantic Cotton Mills, 146 Mass. 47, 48 (where the earlier cases are collected); and does not come within Stone *v.* Boston & Albany Railroad, 171 Mass. 536; Glynn *v.* Central Railroad, 175 Mass. 510; Glassey *v.* Worcester Consolidated Street Railway, 185 Mass. 315. See also Clifford *v.* Atlantic Cotton Mills, 146 Mass. 47, 49.

Exceptions overruled.

COLE *v.* GERMAN SAVINGS & LOAN SOCIETY.

CIRCUIT COURT OF APPEALS, 1903. 293 F 2

[*Reported* 124 *Fed.* 116.]

The plaintiff, Viola Cole, sued the German Savings & Loan Society for damages which she alleged were the result of its negligence in the care and operation of its elevator, and at the close of the trial these facts were established: About 4 o'clock in the afternoon of a bright sunshiny day in May, the plaintiff, a lady 32 years of age, entered the hall of a building of the German Savings & Loan Society for the purpose of riding on an elevator to an upper story. The well of this elevator was about forty feet distant from the entrance to the hall, into which it opened. It was separated from the hall by a door, which at the time was standing open not more than ten inches. As the plaintiff passed through this hall, a boy who was a stranger to her, and who was not employed by or authorized to act for the defendant, but who had been seen by one of the witnesses prior to that time endeavoring to operate the elevator once, and riding upon it and visiting the boy in charge of it a dozen times, hurriedly passed the plaintiff, seized the sliding door to the elevator shaft, pushed it back as far as it would go, and stepped back. The elevator was at an upper story in charge of its regular operator. The plaintiff supposed that the strange boy was the

[1] Part of the opinion is omitted.— ED.

operator of the elevator, stepped into the shaft, and fell 10½ feet to its bottom, and was seriously injured. The hall was dark and gloomy. It was difficult to see the elevator at the lower floor, but it was not impossible to see it. When it was not at that floor, nothing but darkness was visible in the well below it. There was no artificial light in the hall at the time of the accident, although there were the means to make an electric light, which was often lighted, just in front of the door of the shaft. This door was furnished with a hook, which, when the door was closed, entered a slot and grasped a bar. But the door could be opened from the outside, even when it was latched by lifting it and pushing it back. When the employee in charge of the elevator jammed the door, it would bound back and slide open from 1 to 10 inches. The court instructed the jury, upon this state of facts, to return a verdict for the defendant, and this charge, together with certain rulings rejecting proffered testimony, is assigned as error.

SANBORN, C. J. The crucial question in this case is whether or not the negligence of the defendant was the proximate cause of the injury of the plaintiff, so that, in the legal acceptation of that term, it contributed to her hurt. "Causa proxima, non remota, spectatur," and those damages which are the result of remote causes form a part of that large mass of resulting losses styled "damnum absque injuria," for which the law permits no recovery. A clear conception of the test which distinguishes the proximate from the remote cause is, therefore, the first and the indispensable prerequisite to a true answer to the question which this case presents; for by that test alone must the issue here, in all the varying garbs in which the ingenuity of counsel has clothed it, be tried and be ultimately determined. This test is most clearly seen from the standpoint of the injury inflicted, and is well disclosed by these indisputable principles of the law:

An injury that is the natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury. But an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury. An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. Such an act of negligence is the remote, and the independent intervening cause is the proximate, cause of the injury. A natural consequence of an act is the consequence which ordinarily follows it — the result which may be reasonably anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it. Chicago, St. P., M. & O. Ry. Co. *v.* Elliott, 55 Fed. 949, 952, 5 C. C. A. 347, 350, 20 L. R. A.

582; Railway Co. v. Kellogg, 94 U. S. 469, 475, 24 L. Ed. 256; Hoag v. Railroad Co., 85 Pa. 293, 298, 299, 27 Am. Rep. 653.

Let us try the issue in hand by these familiar rules. It goes without saying that the injury of the plaintiff was the natural and probable consequence of the act of the trespasser who preceded the plaintiff to the elevator, opened the door of the well, and stepped back, thus inviting her to pass into the shaft. No one can contemplate this act for a moment without a clear conviction that the fall and the injury were its natural and probable result. This act was, therefore, a proximate cause of the injury — an act of negligence which formed the basis for an action for damages against the strange boy who committed it. It was not only the nearest cause of the disaster in point of time, but it was the moving and efficient cause — the cause without which, so far as finite vision can see, the accident would never have occurred.

Counsel for the plaintiff do not deny this obvious conclusion, but they insist that the negligence of the strange boy merely concurred with the acts of omission and commission of the defendant; and they invoke the conceded rule that it is no defense to the damages resulting from an act of negligence that the carelessness of another concurred with the negligence of the defendant to produce the injury. Among other authorities they cite the case of Union Pac. R. Co. v. Callaghan, 56 Fed. 988, 993, 994, 6 C. C. A. 205, 210, in support of this position. In that case the negligence of a conductor of a train of cars who recklessly directed his engineer to disregard a signal to stop, which was given at a station they were passing, concurred with the succeeding failure of the engineer to observe and heed other signals of danger, and led him to drive the train upon a defective bridge, and this court held that the concurring negligence of the engineer was dependent upon the prior reckless order of the conductor; that the engineer's negligence was a dependent, and not an independent, cause of the disaster, that it did not break and turn aside the natural sequence of events between the recklessness of the conductor and the accident, but simply permitted that act to work out its natural and probable result; and that for this reason it constituted no defense to the action for damages for the negligence of the conductor. In the opinion this court said:

"The independent intervening cause that will prevent a recovery on account of the act or omission of a wrongdoer must be a cause which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original act or omission, and produces a different result, that could not have been reasonably anticipated." 56 Fed. 993, 994, 6 C. C. A. 210.

But it also said:

"No act contributes to an injury, in the legal acceptation of that term, unless it is a proximate cause of that injury — unless it is near

to it in the order of causation. Jacobus v. Railway Co., 20 Minn. 125, 134 [(Gil. 110), 18 Am. Rep. 360]." 56 Fed. 990, 6 C. C. A. 207.

The test of the liability, therefore, in cases of concurring negligence is the same that it is in all other actions for negligence. It is the true answer to the questions: Was the injury the natural and probable consequence of the act on which the action is based? Was it reasonably to be anticipated from that act? If it was, the action may be maintained, although the negligence of another concurred to produce the untoward result. If it was not, the act of negligence will not sustain an action, whether the act of another concurred or failed to concur to produce it. A negligent act from which an injury could not have been foreseen or reasonably anticipated is too remote in the line of causation to sustain an action for an injury in every case, and the concurring negligence of another cannot make it less remote, nor charge him who committed it with responsibility for it to which he would not have been liable to answer in the absence of the negligence of the third party.

It is not here asserted that there may not be many cases in which one who has committed a negligent act may be liable for an injury which is the result of his wrongful act and of the concurring negligence of another, but which would not have followed in the absence of the recklessness of the third party. The succeeding or concurring negligence of another and its evil consequences may be the natural and probable result of a defendant's act of negligence, so that the latter may be actionable. But, unless the ultimate injury is the natural and probable consequence of the defendant's act of negligence, that act is not the proximate cause of the injury, and no action can be maintained upon it, whether the succeeding injury results from that act alone or from that act and the concurring or succeeding negligence of a stranger. In other words, the concurring negligence of another cannot transform an act of negligence which is so remote a cause of an injury that it is not actionable into a cause so proximate that an action can be maintained upon it. It cannot create a liability against one who does not legally cause it, or make an injury the natural and probable result of a prior act of negligence which was not, or would not have been, such a result in its absence. No act contributes to an injury, in the legal acceptation of that term, unless it is a proximate cause of that injury—unless that injury could and ought to have been foreseen or reasonably anticipated as its probable consequence. The conclusion inevitably follows that the concurring negligence of the trespasser in this case does not answer the primary question which the action presents. It leaves it entirely undetermined, and that question still recurs. Was the injury of the plaintiff the natural and probable result of the acts or omissions of the defendant? Let us see.

That negligence consisted of permitting such a degree of darkness in the hall opposite the door which opened into the well of the elevator

that it was difficult to see whether or not the elevator was there; of allowing boys to visit in, ride upon, and sometimes to operate the elevator; of allowing the boy who opened the door to the well to ride and visit in the elevator about a dozen times, and to endeavor to operate it at least once; of neglecting to provide a lock for the door which would prevent any one from opening it from the outside; and of permitting the door to stand open from one to ten inches. The burden of proof was upon the plaintiff to establish a state of facts which would naturally lead to the conclusion that her entrance and fall in the well were the natural and probable consequences of these acts of negligence committed by the defendant. If she failed to successfully bear this burden, she was entitled to no damages from the Savings & Loan Society. Chicago, St. P., M. & O. Ry. Co. *v.* Elliott, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582; Union Pac. Ry. Co. *v.* Callaghan, 56 Fed. 988, 993, 6 C. C. A. 205, 210. Where is the evidence to sustain such a conclusion? The best evidence upon such an issue is the testimony of experience, because what has been is our best guide to what will be. The challenged acts and omissions of the defendant had been in operation for many months. If they had produced such a consequence as the fall and injury of the plaintiff in the past, that fact would have raised a strong presumption that this was their natural tendency. If they had produced no such result, the counter presumption was not less strong. It is for this reason that courts frequently speak of the fact that no such injuries as those upon which the actions under their consideration are based have occurred before as persuasive evidence that the disasters could not have been foreseen or reasonably anticipated as the probable result of the acts upon which the suits are based. Cleveland *v.* New Jersey Steamboat Co., 68 N. Y. 306, 312. There is no evidence in this case that any such accident or injury as that from which the plaintiff suffers ever followed the defendant's acts of negligence before the plaintiff fell into the well. Not only this, but there is no evidence that the accident and injury to the plaintiff resulted from these acts or omissions, but positive and convincing testimony that they were produced by the wrongful act of another.

Another class of evidence sometimes presented in cases of this nature consists of the testimony of witnesses that the negligence of the defendant which forms the basis of the action has at times placed them in imminent danger of like accidents, from which they have hardly escaped without injury. But this record is barren of evidence of this character. Experts sometimes come to say that a piece of machinery was so defective, or the method of its operation of so dangerous a character, that in their opinion the condition or the method of operation naturally tended to an accident or injury of the nature of that upon which the action on trial is based. But no expert gave such testimony in the case at bar. The record is barren of all testimony upon the subject, except proof of the acts and omissions of the defendant which

have been recited, and of the fact that a proximate cause of the accident was the act of the trespasser who opened the door and extended to the plaintiff the invitation to step into the darkness and to fall, which she accepted. There is nothing in the evidence to the effect that the defendant's acts or omissions ever had produced, or ever would in the natural sequence of events have produced, any such injury as that from which the plaintiff is suffering, while the proof is plenary that it was the act of the stranger which actually caused it.

But counsel seek to escape from the natural effect of this evidence by the contention that the voluntary act of the strange boy in opening the door of the well when the elevator was at an upper floor could and should have been foreseen and anticipated as the probable result of the unlocked door, of the visits of the boy upon the elevator, and of his previous attempt to operate it. This argument loses sight of the fact that the wrongful act of this trespasser was not committed in operating, or in attempting to operate, the elevator, in riding or visiting upon it, or in the doing of any act which he had ever done before. He had never opened the door into the empty well and invited a patron of the elevator to step into it before this accident occurred. How could any one reasonably anticipate that he would be guilty of such an act? The facts that he had visited upon the elevator and had attempted to operate it with the permission of the employee in charge of it gave no warning of any such purpose on his part or of the probability of any such act. Mr. Justice Holmes in delivering the opinion of the Supreme Court of Massachusetts in Burt *v.* Advertiser Newspaper Co., 154 Mass. 238, 247, 28 N. E. 1, 6, 13 L. R. A. 47, said: "Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual."

The act of the strange boy was a violation of the law. It was a trespass upon the property and upon the rights of the defendant. The defendant could not foresee or reasonably anticipate, and it was not required to anticipate or to provide for, violations of the law and trespasses upon its property by its fellow citizens. The legal presumption was that this boy and all boys and men would obey the law, would refrain from committing trespasses upon the defendant's rights or property, and would discharge their moral and social duties. The defendant had the right to indulge in this presumption, and to calculate the natural and probable result of its acts and omissions upon this supposition. Indeed, it could reckon upon no other; for it is alike impracticable and impossible to predicate and administer the rights and remedies of men upon the theory that their associates and fellows will either violate the laws or disregard their duties. Little Rock & M. R. Co. *v.* Barry, 84 Fed. 944, 950, 28 C. C. A. 644, 650, 43 L. R. A. 349. The mischievous act of the strange boy which caused the plaintiff's hurt

could not have been foreseen nor reasonably anticipated as the probable result of the defendant's acts of negligence, because it was a violation of law and of duty, and because there was nothing in previous experience, observation, or information to lead to such an anticipation. This concludes the discussion of the facts relative to the relations and situation of the parties as disclosed by the record, in view of the arguments of the counsel for the plaintiff.

It is now no longer difficult to determine whether or not the acts of the defendant were the proximate cause of the injury to the plaintiff. Wharton says:

"Supposing that, had it not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of responsible human action. I am negligent on a particular subject-matter as to which I am not contractually bound. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured." Whart. Neg. § 134.

Bishop on Noncontract Law, § 42, says:

"If, after the cause in question has been in operation, some independent force comes in and produces an injury, not its natural or probable effect, the author of the cause is not responsible."

Judge Cooley and the Supreme Court of North Carolina say in his words:

"If the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." Clark *v.* Wilmington, etc., R. Co., 109 N. C. 430, 449, 14 S. E. 43, 47, 14 L. R. A. 749.

The Supreme Court declares:

"The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" Railway Company *v.* Kellogg, 94 U. S. 469, 475, 24 L. Ed. 256.

And again:

"The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones." Insurance Company v. Boon, 95 U. S. 117, 130, 24 L. Ed. 395.

The Circuit Court of Appeals for the Seventh Circuit holds that:

"The remote cause is that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof. . . . The causal connection between the negligence and the hurt is interrupted by the interposition of an independent human agency; and, as Mr. Wharton expresses the thought, 'the intervener acts as a nonconductor, and insulates the negligence.' The test is: Was the intervening efficient cause a new and independent force, acting in and of itself in causing the injury and superseding the original wrong complained of, so as to make it remote in the chain of causation, although it may have remotely contributed to the injury as an occasion or condition?" Goodlander Mill Co. v. Standard Oil Co., 63 Fed. 400, 405, 11 C. C. A. 253, 258, 459, 27 L. R. A. 583.

And this court has said:

"An injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and that would not have resulted from it, but for the interposition of some new independent cause that could not have been anticipated." Chicago, St. P., M. & O. Ry. Co. v. Elliott, 55 Fed. 949, 951, 952, 5 C. C. A. 347, 349.

Try this case by any of these tests, and the result is the same. The independent voluntary act of the strange boy who opened the door of the elevator and invited the plaintiff to enter the well was incapable of anticipation. No one could have foreseen it as the probable consequence of the acts or omissions of the defendant. It broke the chain of causation between the prior negligence of the defendant and the injury of the plaintiff, insulated the defendant's acts and omissions from the plaintiff's hurt, and imposed upon the boy who willed and committed the act which produced the injury the sole liability for the damages which resulted from it. The acts and omissions of the defendant were too remote to legally contribute to the injury or to impose liability for it. They were not a proximate cause of the accident, and the mischievous and wrongful act of the strange boy was the sole moving efficient proximate cause that produced it. Railroad Co. v. Barry, 84 Fed. 944, 950, 28 C. C. A. 644, 650, 43 L. R. A. 349; Railroad Co. v. Elliott, 55 Fed. 949, 952, 5 C. C. A. 347, 350; Finalyson v. Milling Co., 67 Fed. 507, 512, 14 C. C. A. 492, 496; Railway Co. v. Bennett, 69 Fed. 525, 16 C. C. A. 300; Railway Co. v. Callaghan, 56 Fed. 988, 993, 6 C. C. A. 205,

210; Railway Co. v. Moseley, 57 Fed. 921, 926, 6 C. C. A. 641, 646; Insurance Co. v. Melick, 65 Fed. 178, 184, 12 C. C. A. 544, 550, 27 L. R. A. 629; Goodlander Mill Co. v. Standard Oil Co., 63 Fed. 400, 11 C. C. A. 253; Laidlaw v. Sage, 158 N. Y. 73, 98-102, 52 N. E. 679, 44 L. R. A. 216; Trewatha v. Milling Co., 96 Cal. 494, 500, 28 Pac. 571, 31 Pac. 561; Ayers v. Rochester Ry. Co., 156 N. Y. 104, 108, 50 N. E. 960; Doherty v. Waltham, 4 Gray, 596; Parker v. Cohoes, 10 Hun, 531.

Our conclusion has not been reached without a careful perusal of the opinions of the courts in the cases cited by counsel for the plaintiff in error, especially those in Colorado Mortgage & Investment Co. v. Rees (Colo. Sup.) 42 Pac. 42; Tousey v. Roberts, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. Rep. 655; and Lane v. Atlantic Works, 111 Mass. 136. These opinions have been read with the deference and consideration to which the judgments of learned and conscientious jurists are always entitled, but they are not controlling authority in a federal court; and the views which have already been expressed in this opinion, the reasons which have been given for them, and the authorities which have been cited in support of them commend themselves more forcibly and persuasively to our minds than the opinions and reasoning in the cases upon which the counsel for the plaintiff rely. Jurisdiction over controversies between citizens of different states was conferred upon the national courts for the avowed purpose of securing to the litigants in such cases the benefit of the independent opinions of the judges of those courts. It is the right of these litigants to the independent and conscientious judgment of the judges of the national courts to whom they present their controversies upon the merits of the issues they raise, and a complete and careful discharge of the duties imposed upon them requires of the members of the federal judiciary that they shall carefully form and express their independent judgments upon the questions presented by such controversies. In the case at bar this duty has been discharged, not without some study, deliberation, and care, and the conclusion of this court is that the record before it conclusively shows that the act of the strange boy who opened the door of the well of the elevator was the sole proximate cause of the plaintiff's injury.

Counsel earnestly invoke the rule announced in Railway Co. v. Kellogg, 94 U. S. 469, 474, 476, 24 L. Ed. 256, which was followed by this court in Railway Co. v. Callaghan, 6 C. C. A. 205, 208, 56 Fed. 988, 991, and Insurance Co. v. Melick, 65 Fed. 178, 180, 12 C. C. A. 544, 546, 27 L. R. A. 629, that the question, What is the proximate cause of an injury, is ordinarily a question for the jury, and they strenuously maintain that the Circuit Court erred because it refused to submit the question which has been considered to the jury upon the trial below. There is, however, always a preliminary question for the judge at the close of the evidence before a case can be submitted to the jury, and that question is, not whether or not there is any evidence,

but whether or not there is any substantial evidence upon which a jury can properly render a verdict in favor of the party who produced it. Brady v. Chicago & G. W. Ry. Co., 114 Fed. 100, 105, 52 C. C. A. 48, 52, 53, 57 L. R. A. 712; Railway Co. v. Belliwith, 83 Fed. 437, 441, 28 C. C. A. 358, 362; Association v. Wilson, 100 Fed. 368, 370, 40 C. C. A. 411, 413; Commissioners v. Clark, 94 U. S. 278, 284, 24 L. Ed. 59; North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 733, 8 Sup. Ct. 266, 31 L. Ed. 287; Railway Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; Laclede Fire Brick Mfg. Co. v. Hartford Steam Boiler Inspection & Ins. Co., 60 Fed. 351, 354, 9 C. C. A. 1, 4; Gowen v. Harley, 56 Fed. 973, 6 C. C. A. 190; Motey v. Granite Co., 74 Fed. 155, 157, 20 C. C. A. 366, 368.[1]

TEIS v. SMUGGLER MINING CO.

CIRCUIT COURT OF APPEALS, 1907.

[*Reported* 158 *Fed.* 260.]

PHILLIPS, D. J. This is an action for personal injury. At the conclusion of the plaintiff's evidence the court directed a verdict for the defendant in error. To reverse this action the plaintiff has brought the case here on a writ of error.

The plaintiff was an employee of the defendant, working in its mine, in which there was more or less gas escaping. He had worked in this mine for twelve or fourteen months prior to the accident. In the month of August, 1903, some of the timbers employed in the mine took fire, when the work therein was suspended until the first part of September. The plaintiff returned to work about three days prior to the injury in question. He was engaged, in connection with one Crozier, a fellow servant, in hauling ore out of the mine with a tramway car drawn by a horse. On the afternoon of September 8, 1903, the gas in the level where the plaintiff was at work manifested itself in sufficient quantity to make it uncomfortable to the plaintiff and his fellow workman. They came out of the mine two or three times, and remained in the fresh air for half an hour or more at a time to get rid of the effects of the gas. The last time was just before supper, when the plaintiff complained of a headache produced by the gas. His testimony is that:

"We did pretty well before supper, and did not feel the gas very much. Of course, we felt it a little bit, and Crozier asked me how I felt about supper time. I told him I was not feeling very good — and said I would not like to go in there again right away. He said: 'Wait a little while,

[1] The remainder of the opinion discusses other points.

See also Colorado M. & I. Co. v. Rees, 21 Colo. 435, 42 Pac. 42, Claypool v. Wigmore, 34 Ind. App. 35, 71 N. E. 509. — ED.

and you'll feel all right.' Pretty soon he came along with the horse and train, so I thought I would not let him go in alone, and I jumped on too, of course. When we got in, we found that the chutes were tied up, and Crozier told me to go up to the 40 foot, the gas was not so bad, and he said he would load the car, and I said 'All right,' and started out, and that is all I know about it. I must have dropped right there."

He further testified that just after supper, when they started into the mine, Crozier took a piece of waste and tied it around his nose. He further testified to having had a conversation with Mr. Carey, the mine superintendent, before he went into the mine the last time; that Mr. Carey asked him how he felt and he told him he had a headache, and Carey told him he would get over that, that it would not hurt him; that he need not be afraid, there was no danger about the gas. As the plaintiff and Crozier did not return to the surface as soon as expected by the men at the top, which was an hour or more after they had returned to work, a searching party went after them. The plaintiff was found about a hundred or more feet from the elevator shaft, to one side of the tramway track, prostrate on the ground, with his face downward, and in a comparatively unconscious condition. Crozier was found lying on top of him dead. There were two methods of egress from where they were found: One was out by the tunnel through which the tramway ran, some 500 or 600 feet. The other was by the elevator cage. The rescuers carried the plaintiff to the latter, which was a square cage about 5½ feet wide between the sides, two of which were closed and the other two were open. The shaft, of course, was larger, with timbers eight feet by eight inches. There was no light in the elevator, except, perhaps, the customary lamps on the men's hats or caps. The rescuers laid the plaintiff on the floor of the elevator; and their testimony is that in their ascent the plaintiff did not move. When they reached the surface, upon examination, it was discovered that one of the plaintiff's legs at the ankle was broken, and the injury was more or less serious. His testimony was that in going up the elevator, in a dazed kind of way, his eyes opened, when he felt the shock, and he seemed to fall asleep again, that he recollected that much of it, and it was all he knew about it.

The petition counts alone upon this injury to the leg as the basis of damages.[1] . . .

The important question therefore is: Was the injury to the plaintiff's leg the proximate cause of the imputed negligence of the defendant company in exposing the plaintiff, according to his contention, to the gas in the mine?

Without undertaking to review the mass of authorities bearing on this vexed question, it is sufficient to say that they range themselves

[1] Part of the opinion is omitted. — ED.

along two lines, closely allied, but more or less divergent. The one asserts that, when several concurring acts or conditions of things — one of them the wrongful act of the defendant — produce the injury, and it would not have been produced but for such wrongful act or omission, it is the proximate cause of the injury. From this postulate the plaintiff's counsel argues that but for the gas in the mine the plaintiff would not have been rendered helpless, so as to have been exposed to the supervening negligent act of the men in so placing him in the elevator cage as to leave his leg extending beyond the outside thereof, whereby it came in contact with the timbers; and therefore the negligent act of exposing him to the gas was a continuing, unbroken cause. This, it seems to us, is the argument *post hoc propter hoc*. It runs back to the first wrongdoer, no matter how many supervening or intervening causes. It admits of no break in the chain of causation, because it is builded on the presumption that but for the first negligent act the person injured might not have come into the position where the supervenient cause, although put in motion by a force entirely independent of the first, smote the party to his injury. Carried to its logical sequence, where A. should wrongfully eject B. from his house at a time when the sky was clear, if a storm should suddenly arise and a flash of lightning should kill B., his death would be the proximate cause of the act of ejection. Opposed to this doctrine is the line of authorities asserting the rule to be that, where the negligent act of the defendant is not wanton, the law attaches responsibility to it for all the consequences which ensue directly therefrom, and for such effect as, in the natural order of sequence, follows therefrom, no matter how remote in point of time or distance, limited by the requirement that the ultimate result must be such as that a reasonable person should anticipate that in the natural order of things would probably ensue. Whenever this causal connection between the negligent act and the ultimate injury is interrupted by reason of the interposition of some independent force or human agency, acting independently of the first negligent act, but for which the ultimate injury would not have come, the former is the remote and the latter is the proximate cause. This is very aptly expressed by Wharton thus:

"The intervener acts as a nonconductor and insulates the negligence."[1]

Turning to the case in hand, it may be conceded that the mineowner might be held to have reasonably anticipated that, permitting gas to flow in the mine, a workman exposed thereto might be overcome and rendered unconscious. It may also be conceded that it would not be an unnatural course to pursue by the men, on discovering the plaintiff prostrate in the mine, to carry him to the elevator as the shortest and quickest method of taking him to the surface for restoration. It may

[1] The court here considered many authorities. — ED.

further be conceded, for the purposes of this case, that, with the knowledge the defendant had of the construction of the elevator and its mode of operation, a disabled man would, in the passage to the surface, be exposed to the usual and ordinary incidents of such mode of carriage. Beyond question, the defendant could be held liable for any injury to the lungs and the general health of the plaintiff traceable directly to his exposure to the gas. But here its responsibility would end. The elevator from side to side was about 5½ feet, nearly the length of an ordinary man. As it was square, there was ample room between the transverse corners in which the plaintiff could have been laid without his leg extending over the side of the elevator. And had he been, with ordinary care, laid crosswise at full length, his feet would not have extended outside of the elevator over two or three inches. In the absence of any knowledge, so far as this record discloses, on the part of the defendant that any person carried up the elevator had ever had his feet or legs injured by coming in contact with the wall of the shaft, would it be within the range of reasonable probability that the company should be held to have reasonably anticipated that the rescuers would so carelessly dump the plaintiff in the car as to leave his leg unnecessarily protruding beyond the elevator, and thereby be broken by coming in contact with the wall of the shaft?

It cannot be said that, if the plaintiff had not been rescued at the time he was, he would have died. The fact that Crozier, who lay above him, was dead, and that the plaintiff, whose face was to the ground, was still living, would indicate that the gas was not so deleterious next to the earth. And that the gas had measurably spent its destructive force at the time the plaintiff was discovered is evidenced by the fact that the rescuing party carried him out without inconvenience to themselves on account of the presence of gas, and that they returned thereafter and brought up the body of Crozier. The horse was also discovered near by and was led out the length of the tunnel by one of the employees, without injurious result. Suppose that the rescuing party had thought it the better course to have carried the plaintiff out to the open through the tunnel, and to that end had placed him on the ore car; but in their haste they left his leg hanging over the edge of the car, and the horse drawing the car towards the mouth of the tunnel had become frightened, or from viciousness, had kicked the plaintiff and broken his leg, would that have been a probable result that the defendant should be held to have reasonably anticipated from the plaintiff's exposure to gas in the mine? This very situation is aptly illustrated by the case of Roedecker *v.* Metropolitan Street Railway Company, 87 App. Div. 227, 84 N. Y. Supp. 300, where the plaintiff, under the direction of the conductor, rode on the front platform of a horse car. Through the negligence of the company respecting the track the horse fell, which stopped the car. The car was moved backward so that the horse could be released, and, when released, it

kicked the plaintiff, who was standing on the platform. It was held that the driver's negligence ended with the fall of the horse, and therefore the injury was not the proximate cause of the negligent act. After adverting to the lack of harmony in the decisions, the court said:

"The principle to be evolved from their consideration is that, although a situation may be produced by negligence, it is only for injuries which probably, naturally, or necessarily flow from such negligence, without the intervention of another and a distinct cause or agency, that the author of the negligence can be held liable; and this would exclude injuries resulting from another, subsequent, different, and independent cause. . . . We must be careful to avoid confusing two things which are separate and distinct, namely, that which causes the injury and that without which the injury could not have happened. . . . If, after the cause in question has been in operation, some independent force comes in and produces an injury, not its natural or probable effect, the author of the cause is not responsible."

When the plaintiff was carried to the surface of the mine, and the doctor had placed him on the table for examination, had some third party carelessly struck a leg of the table and overturned it, whereby the plaintiff's leg would have been broken, could it be said that that was the natural or probable result of the presence of gas in the mine, which the defendant should be held to have anticipated? The breaking of the plaintiff's leg was such an abnormal, extraordinary incident, through the carelessness of the men who carried him up the elevator, as to exclude it from the range of reasonable probability as the result of the gas in the mine. It was a result that might not have happened in a thousand repetitions of the act of carrying him up the elevator. As well say, if his rescuers had abstracted his pocketbook or his watch, while he was comparatively unconscious and helpless, the defendant company should be held liable because he was rendered helpless by the gas, and that that was the first and continuing unbroken cause. The law is that in all the relations and transactions of business life we have a right to assume that others will perform their duty and discharge their undertakings in a reasonable, prudent, and careful manner. We are not held to assume that injury will come as the result of the carelessness or incautiousness of others.

The final contention on behalf of plaintiff in error is that the question of proximate and remote cause should have been submitted to the determination of the jury. Where the facts of the particular case are disputable, and are of such character that different minds might reasonably draw different conclusions therefrom, it presents a question of fact properly determinable by the jury; but where, as in this case, there is no dispute about the facts, and the law pronounces the judgment on the facts established, it is the province and duty of the court to direct the verdict. This has been so ruled in respect of this character

of action. Hoag *v.* Lake Shore & M. S. Ry. Co., *supra*; S. S. Pass. Ry. Co. *v.* Trich, *supra*; Goodlander Mill Company *v.* Standard Oil Company, 63 Fed. 400, 407, 11 C. C. A. 253, 27 L. R. A. 583; Cole *v.* German Savings & L. Association, *supra*.

The circuit court did not err in directing a verdict for the defendant, and its judgment is affirmed.

BURROWS *v.* MARCH GAS CO.

COURT OF EXCHEQUER, 1870.

[*Reported* L. R. 5 *Ex.* 67.]

KELLY, C. B. I am of opinion that this rule ought to be discharged. The action has been said to be one of contract, but in point of fact the statement of the contract in the declaration seems to me to be made by way of inducement only, and the substantial complaint is rather of a tort than of a breach of contract. The contract was that the defendants should supply the plaintiff with a gas pipe from the main to a meter under the plaintiff's staircase, and the mischief for which damages are sought to be recovered arose thus:— The pipe having been laid down required testing, and in order to test it, gas was laid on and the pipe was filled. This was done without any notice to Bates, the gasfitter. The defendants sent no one to test the pipe, but on the night of the accident, one Sharratt, the servant of Bates, was told there was an escape of gas. On hearing this, he went, not for the purpose of testing the defendants' pipe but of examining Bates's work, and of attempting to discover the cause of the escape, into the plaintiff's shop with a lighted candle, and an explosion ensued, doing the damage for which the plaintiff now seeks to render the defendants liable. Now, it is clear that the injury was not caused entirely by the mere act of the defendants in furnishing an insufficient pipe. But the gas having escaped by reason of that insufficiency, was exploded in consequence of the lighted candle being brought in contact with it, and thus from the two causes conjointly, the defect in the defendants' pipe and the imprudence of Sharratt, in introducing a lighted candle into the shop, the accident happened. Under these circumstances, if Sharratt had been a servant of the plaintiff there would have been contributory negligence. Here, however, he was the servant of Bates, the gasfitter, and unless Bates is, for this purpose, identical with the plaintiff, this is not a case in which the plaintiff contributed to the accident, for the owner of premises cannot be held liable for the negligence of independent tradesmen. Neither can he be disentitled to recover because their joint negligence concurs to cause an injury; otherwise, if a number of independent tradesmen were employed on his premises in various

capacities, and for different purposes, the result might be that he would find himself without a remedy against any for an injury arising from separate acts of negligence by each. Suppose, for instance, carpenters and bricklayers happened to be employed at the same time, as in this case, Bates the gasfitter, and the defendants the gas suppliers, were employed, and damage arose from the negligence of both. The carpenters might shift the responsibility on to the bricklayers, or the bricklayers on to the carpenters, and thus the person damnified might be left without a remedy. But such is not the law. If a man sustain an injury from the separate negligence of two persons employed on his premises to do two separate things, as in this case the plaintiff has sustained an injury from the negligence of the gasfitter's servant on the one hand and of the gas company on the other, he can, in my opinion, maintain an action against both or either of the wrongdoers. Here he has thought fit to sue the company, and on the facts proved, their negligence is complete. They laid down an unfit and improper pipe; they turned on the gas without notice to the gasfitter of their intention; they took no precaution by proper testing or otherwise to prevent the gas escaping. Sharratt did not go to test their work, but that of Bates. He was an entire stranger to the defendants, as he was to the plaintiff also. The negligence on their part, therefore, seems to me complete. The jury found that the escape of gas came from a defect in the pipe supplied by the defendants, and that that defect was there when the pipe was supplied. They further found, though not directly in answer to any question put to them, that the defendants ought to have caused the pipe to be tested by some competent person. The negligence on their part, accordingly, is clearly established, and the concurrent act of negligence on the part of Sharratt, who was a stranger alike to the plaintiff and the defendants, cannot exonerate them. I think, therefore, that the verdict found at the trial was right, and ought to be sustained.[1]

QUAKER OATS CO. v. GRICE.

CIRCUIT COURT OF APPEALS, 1912.

[*Reported* 195 *Fed.* 441.]

The action was brought to recover damages occasioned by the destruction by fire of the dwelling house and buildings occupied by plaintiff and their contents, alleged to be caused by the negligence of defendant. Defendant for several years before the fire had been operating a plant at Richford, Vt., consisting of a grinding mill and elevator build-

[1] See also Merrill v. Los Angeles G. & E. Co., 158 Cal. 499, 111 Pac. 534; Logansport & W. V. G. Co. v. Coate, 29 Ind. App. 299, 64 N. E. 638; Koelsch v. Philadelphia Co., 152 Pa. 355, 25 Atl. 522. — ED.

ing, with other structures connected therewith. This plant was used by defendant for the manufacture of mixed feed. This manufacture involved the elevation and storage of whole grain, the grinding of grain, the elevation, storage, and mixing of certain finely ground products manufactured elsewhere and shipped to this plant in bulk or in bags. As a result of these operations, large quantities of dust accumulated in the main building, on the floor, the beams and other exposed surfaces above the floor, and when the machinery was running the vibration of the building would cause the dust to rise or to sift off into the atmosphere, which became so dense that there "was trouble in looking through it." This dust was well known to be a combustible substance, which, when diffused and mixed with air, would upon the application of a flame or spark, ignite and explode.

On the afternoon of October 7, 1908, a violent explosion occurred in the main building, which was followed by a fire which entirely consumed that building, and which was communicated to the adjoining buildings of plaintiff. Several lives were lost as a consequence of the explosion, and no living witness testified as to seeing a flame or a spark in the building just prior to the explosion; but the testimony warrants the conclusion, and apparently no one disputes it, that the explosion was caused by the conjunction of the inflammable dust and some spark or flame.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Although the declaration avers two grounds of negligence — accumulation of inflammable dust and spontaneous combustion of some ground grain (shives) which had been allowed to remain undisturbed in a bin — the main thing relied on by the plaintiff was the dust. This is manifest from his counsel's opening address (which has been printed in the record) and from the testimony. If the jury were satisfied that the cause of the explosion was the presence of this dust, and that reasonable care had not been taken to remove so much of it as to render the premises safe, they were warranted in finding defendant negligent, even though they were not satisfied that the flame was produced by spontaneous combustion. If premises are allowed to become unsafe because they are filled with dust which would explode on the application of spark or flame, and the exercise of reasonable care would have prevented the premises from becoming thus unsafe, the person whose neglect brought about such a dangerous condition would not be excused because the actual spark which fired the train was produced by some intruder undertaking to light his pipe.[1]

[1] The remainder of the opinion is omitted. — ED.

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WATSON v. KENTUCKY & INDIANA BRIDGE & RAILROAD CO.

COURT OF APPEALS OF KENTUCKY, 1910.

[*Reported* 137 *Ky.* 619.]

SEATTLE, J. This action was instituted by the appellant, John Watson, in the court below, against the appellees, Kentucky & Indiana Bridge & Railroad Company, hereinafter called the Bridge & Railroad Company, the Southern Railway Company, the Southern Railway Company in Kentucky, and the Union Tank Line Company, to recover $20,000 damages for injuries sustained to his person on the night of June 14, 1907, from an explosion of gas caused, as alleged, by the negligence of the appellees. It was, in substance, alleged in the petition as amended that while a tank car, owned by the appellee Union Tank Line Company, and filled with a highly explosive substance known as gasoline, was being transported through a populous section of the city of Louisville over the roadbed of the appellee Bridge & Railroad Company, it was derailed and its valve broken, thereby causing all the gasoline to escape and flow in large quantities on the street and into the gutters; that from the gasoline thus flowing and standing in pools upon the street and gutters there arose and spread over the neighborhood of the place of derailment and into the houses of the residents thereof, great quantities of highly explosive and combustible gas which, three hours after the derailment of the tank car, exploded with force from contact with a lighted match thrown on the street by one Chas. Duerr, who claimed to have used it in igniting a cigar; that the explosion threw appellant from his bed and almost demolished his house, from the ruins of which he was taken unconscious and bleeding with a fractured jaw and one cheek nearly torn from his face. It was further charged in the petition that the explosion and appellant's consequent injuries resulted from the negligence of all the appellees; the negligence of the Union Tank Line Company lying, as alleged, in its failure to provide the tank car with proper trucks and main valve; that of the Bridge & Railroad Company in failing to maintain in a safe condition the roadbed and track at the point of derailment; in permitting the tank car to remain at the place of derailment in its wrecked condition an unreasonable time, and in allowing ignorant and careless meddling on the part of their servants with the main valve of the tank after it was broken, whereby the flow of the gasoline from the tank was increased instead of diminished.[1] . . .

The lighting of the match by Duerr having resulted in the explosion, the question is, was that act merely a contributing cause, or

[1] Part of the opinion is omitted. — ED.

the efficient and, therefore, proximate cause of appellant's injuries? The question of proximate cause is a question for the jury. In holding that Duerr in lighting or throwing the match acted maliciously or with intent to cause the explosion, the trial court invaded the province of the jury. There was, it is true, evidence tending to prove that the act was wanton or malicious, but also evidence conducing to prove that it was inadvertently or negligently done by Duerr. It was therefore for the jury and not the court to determine from all the evidence whether the lighting of the match was done by Duerr inadvertently or negligently, or whether it was a wanton and malicious act. As said in Milwaukee Railroad Co. *v.* Kellogg, 94 U. S. 469, 24 L. ed. 256: "The true rule is that what is the proximate cause of the injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact in view of the circumstances of fact attending it." Snydor *v.* Arnold, 122 Ky. 557, 92 S. W. 289, 28 Ky. Law Rep. 1252. In Thompson on Negligence, § 161, it is said: "On principle, the rule must be here, as in other cases, that, before the judge can take the question away from the jury and determine it himself, the facts must not only be undisputed, but the inference to be drawn from those facts must be such that fair-minded men ought not to differ about them. It must be concluded that this is so, when it is considered that proximate cause is a cause which would probably, according to the experience of mankind, lead to the event which happened, and that remote cause is a cause which would not, according to such experience, lead to such an event. Now, whether a given cause will probably lead to a given result is plainly to be determined by the average experience of mankind; that is, by a jury rather than by a legal scholar on the bench." No better statement of the law of proximate cause can be given than is found in 21 Am. & Eng. Ency. of Law (2d ed.) 490, quoted with approval in Louisville Home Telephone Company *v.* Gasper, 123 Ky. 128, 93 S. W. 1057, 29 Ky. Law Rep. 578, 9 L. R. A. (N. S.) 548: "It is well settled that the mere fact that there have been intervening causes between the defendant's negligence and the plaintiff's injuries is not sufficient in law to relieve the former from liability; that is to say, the plaintiff's injuries may yet be natural and proximate in law, although between the defendant's negligence and the injuries other causes or conditions, or agencies, may have operated, and, when this is the case, the defendant is liable. So the defendant is clearly responsible where the intervening causes, acts, or conditions were set in motion by his earlier negligence, or naturally induced by such wrongful act or omission, or even, it is generally held, if the intervening acts or conditions were of a nature the happening of which was reasonably to have been anticipated, though they may have been acts of the plaintiff himself. An act or omission may yet be negligent and of a nature to charge a defendant with liability, although no injuries would have

been sustained but for some intervening cause, if the occurrence of the latter might have been anticipated. . . . A proximate cause is that cause which naturally led to and which might have been expected to produce the result. . . . The connection of cause and effect must be established. It is also a principle well settled that when an injury is caused by two causes concurring to produce the result, for one of which the defendant is responsible, and not for the other, the defendant cannot escape responsibility. One is liable for an injury caused by the concurring negligence of himself and another to the same extent as for one caused entirely by his own negligence." Black's Law & Practice, § 21; Thompson on Negligence, §§ 47–52; Whitaker's Smith on Negligence, 27; 29 Cyc. 488–502.

If the presence on Madison Street in the city of Louisville of the great volume of loose gas that arose from the escaping gasoline was caused by the negligence of the appellee Bridge & Railroad Company, it seems to us that the probable consequences of its coming in contact with fire and causing an explosion was too plain a proposition to admit of doubt. Indeed, it was most probable that some one would strike a match to light a cigar or for other purposes in the midst of the gas. In our opinion, therefore, the act of one lighting and throwing a match under such circumstances cannot be said to be the efficient cause of the explosion. It did not of itself produce the explosion, nor could it have done so without the assistance and contribution resulting from the primary negligence, if there was such negligence, on the part of the appellee Bridge & Railroad Company in furnishing the presence of the gas in the street. This conclusion, however, rests upon the theory that Duerr inadvertently or negligently lighted and threw the match in the gas. This view of the case is sustained by the following leading cases, all decided by this court: Snydor *v.* Arnold, 122 Ky. 557, 92 S. W. 289, 28 Ky. Law Rep. 1252; Louisville Gas Co. *v.* Gutenkuntz, 82 Ky. 432; Whitman-McNamara Tobacco Co. *v.* Warren, 66 S. W. 609, 23 Ky. Law Rep. 2120; Louisville Home Telephone Co. *v.* Gasper, 123 Ky. 128, 93 S. W. 1057, 29 Ky. Law Rep. 578, 9 L. R. A. (N. S.) 548. The cases *supra* are, indeed, in point of fact and principle so analogous to the case under consideration as to completely control its determination, and to render further discussion of it unnecessary.

If, however, the act of Duerr in lighting the match and throwing it into the vapor or gas arising from the gasoline was malicious, and done for the purpose of causing the explosion, we do not think appellees would be responsible, for while the appellee Bridge & Railroad Company's negligence may have been the efficient cause of the presence of the gas in the street, and it should have understood enough of the consequences thereof to have foreseen that an explosion was likely to result from the inadvertent or negligent lighting of a match by some person who was ignorant of the presence of the gas or of the effect of lighting or throwing a match in it,it could not have foreseen or deemed it

probable that one would maliciously or wantonly do such an act for the evil purpose of producing the explosion. Therefore, if the act of Duerr was malicious, we quite agree with the trial court that it was one which the appellees could not reasonably have anticipated or guarded against, and in such case the act of Duerr, and not the primary negligence of the appellee Bridge & Railroad Company, in any of the particulars charged, was the efficient or proximate cause of appellant's injuries. The mere fact that the concurrent cause or intervening act was unforeseen will not relieve the defendant guilty of the primary negligence from liability, but if the intervening agency is something so unexpected or extraordinary as that he could not or ought not to have anticipated it, he will not be liable, and certainly he is not bound to anticipate the criminal acts of others by which damage is inflicted and hence is not liable therefor. 29 Cyc. 501–512; Sofield v. Sommers, 9 Ben. 526, 22 Fed. Cas. 769, Cas. No. 13, 157; Andrews v. Kinsel, 114 Ga. 390, 40 S. E. 300, 88 Am. St. Rep. 25.

STONE v. BOSTON & ALBANY RAILROAD CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1898.

[*Reported* 171 *Mass.* 536.]

ALLEN, J. This is an action of tort to recover for the loss of the plaintiff's buildings and other property by fire, under the following circumstances. The defendant owned and operated a branch railroad extending from its main line at South Spencer to the village of Spencer, and had at the Spencer terminus a passenger station, a freight house, and a freight yard, all adjoining a public street. On the side of the freight house, and extending beyond it about seventy-five feet, was a wooden platform about eight feet wide and four feet high, placed upon posts set in the ground, the under side being left open and exposed. The main tracks ran along on the front side of this platform and freight house, and on the rear of the platform there was a freight track, so near as to be convenient to load and unload cars from and upon it. The plaintiff was engaged in the lumber business, buying at wholesale, and selling at wholesale and retail, manufacturing boxes, etc. His place of business comprised several buildings, some of which were across the street from the defendant's buildings; and his principal buildings were about seventy-five feet from the place on the defendant's premises, beneath the platform, where the fire originated. The evidence tended to show that the platform was mostly used for the storing of oil which had been brought upon the railroad, until it was taken away by the consignees; and that the platform had become thoroughly saturated with oil which had leaked from the barrels, and which not only saturated the

platform but dripped to the ground beneath. More or less rubbish accumulated from time to time under the platform, and was occasionally carried away. The evidence tended to show that this space below had been cleaned out two or three weeks before the fire. On the day of the fire, September 13, 1893, from twenty-five to thirty barrels of oil and oil barrels were upon the platform. Some were nearly or quite empty, some were partly full, but most of them were probably full or nearly full. The only evidence to show how the fire originated tended to prove that one Casserly, a teamster, brought a load of boots to be shipped upon a car which was standing upon the track on the rear side of the platform; that he was smoking a pipe; that he stepped into the car to wait for the defendant's foreman of the yard, who was to help him unload the boots; that in stepping in he stubbed his toe and knocked some of the ashes and tobacco out of his pipe; that he relighted the pipe with a match, and threw the match down; and that at this time he was standing in the door of the car, facing the platform. It must be assumed, upon the evidence, that the fire caught upon the ground underneath the platform from the match thrown down by Casserly. All efforts to extinguish the fire failed; it spread fast and was almost immediately upon the top of the platform, running up a post according to one of the witnesses, and very soon it reached the barrels of oil, which began to explode, and the fire communicated to the plaintiff's buildings, and they were burned. There was evidence tending to show that all of the oil had been upon the platform for a longer time than forty-eight hours. According to the testimony of the plaintiff, the platform was never to his knowledge empty of oil and oil barrels, it was completely saturated with oil, and that general condition of things, so far as the platform was concerned, had existed for eight years, ever since he himself had been there. Upon the evidence introduced by the plaintiff, the court directed a verdict for the defendant.

The plaintiff in substance contends before us that the defendant was negligent in storing oil upon the platform, taking into consideration the condition of the platform and of the ground and material under it, and the length of time during which the oil had been allowed to remain there; that, irrespectively of the question of negligence, the platform with the oil upon it constituted a public nuisance, especially in view of Pub. Sts. c. 102, § 74, providing that oil composed wholly or in part of any of the products of petroleum shall not be allowed to remain on the grounds of a railroad corporation in a town for a longer time than forty-eight hours, without a special permit from the selectmen; that the defendant is responsible for the damage resulting from the public nuisance, whether the act of starting the fire was due to a third person or not; and that the question should have been submitted to the jury whether the damage to the plaintiff's property was the natural and proximate consequence of the defendant's tort.

Upon the evidence, the supposed tort of the defendant, whether it be called negligence or nuisance, appears to have been limited to the keeping of oil too long upon the platform. Assuming this oil to have been a product of petroleum, and so within the statute cited, nevertheless the defendant as a common carrier was bound to transport it, and deliver it to the consignees. The oil, as is well known, was an article of commerce and in extensive use, and the defendant was bound to transport it and to keep it for a reasonable time after its arrival in Spencer, in readiness for delivery. There was no evidence that the oil was liable to spontaneous ignition, or that the platform was an unsuitable place for its temporary storage till it could be removed, or that the defendant could have prevented the escape of oil upon the platform from leaky barrels. But we may assume without discussion that the defendant was in fault in keeping the oil there so long, and that if the oil had been removed within forty-eight hours after its arrival the fire would probably not have been attended with such disastrous consequences.

Nevertheless the question remains, and in our view this becomes the important and decisive question of the case, whether, assuming that the defendant was thus in fault, the plaintiff introduced any evidence which would warrant a finding by the jury that the damage to his property was a consequence for which the defendant is responsible; or, in other words, whether the act of Casserly in starting the fire was such a consequence of the defendant's original wrong in allowing the oil to remain upon the platform that the defendant is responsible to the plaintiff for it.

In approaching this question, it must be borne in mind that Casserly was in no sense a servant, agent, or guest of the defendant. He brought a load of goods to the defendant's station to be carried upon the defendant's railroad. The defendant was bound by law to accept and carry them. It could not lawfully exclude Casserly from its grounds. By Pub. Sts. c. 112, § 188, it was bound to give all persons reasonable and equal terms, facilities, and accommodations for the transportation of merchandise upon its railroad, and for the use of its depot and other buildings and grounds. Casserly came there in his own right, and the defendant is not responsible for him in the same way that perhaps it might be responsible for a servant, agent, or, according to some statements of the law, guest. Lothrop *v.* Thayer, 138 Mass. 466. It is also to be borne in mind that this was not a case of spontaneous ignition of a substance liable to ignite spontaneously, as was the case in Vaughan *v.* Menlove, 3 Bing. N. C. 468. Nor did the defendant owe to the plaintiff the duties of a carrier of passengers or freight towards its customers, or any other duties growing out of a contract with the plaintiff. There was no contract of any kind between the plaintiff and the defendant.

The rule is very often stated that in law the proximate and not the

remote cause is to be regarded; and in applying this rule it is sometimes said that the law will not look back from the injurious consequence beyond the last sufficient cause, and especially that where an intelligent and responsible human being has intervened between the original cause and the resulting damage, the law will not look back beyond him. This ground of exonerating an original wrongdoer may be found discussed or suggested in the following decisions and text-books, amongst others: Clifford *v.* Atlantic Cotton Mills, 146 Mass. 47; Elmer *v.* Fessenden, 151 Mass. 359; Hayes *v.* Hyde Park, 153 Mass. 514; Freeman *v.* Mercantile Accident Association, 156 Mass. 351; Lynn Gas & Electric Co. *v.* Meriden Ins. Co., 158 Mass. 570; Mutual Ins. Co. *v.* Tweed, 7 Wall. 44; Milwaukee & St. Paul Railway *v.* Kellogg, 94 U. S. 469; Washington & Georgetown Railroad *v.* Hickey, 166 U. S. 521; Reiper *v.* Nichols, 31 Hun, 491; Mars *v.* Delaware & Hudson Canal, 54 Hun, 625; Read *v.* Nichols, 118 N. Y. 224; Leavitt *v.* Bangor & Aroostook Railroad, 89 Maine, 509; Cuff *v.* Newark & New York Railroad, 6 Vroom, 17; Delaware, Lackawanna & Western Railroad *v.* Salmon, 10 Vroom, 299; Curtin *v.* Somerset, 140 Penn. St. 70; Pennsylvania Co. *v.* Whitlock, 99 Ind. 16; Goodlander Mill Co. *v.* Standard Oil Co., 63 Fed. Rep. 400, 405; Shearman, Negl. §§ 38, 666; Whart. Negl. §§ 134 *et seq.*

It cannot, however, be considered that in all cases the intervention even of a responsible and intelligent human being will absolutely exonerate a preceding wrongdoer. Many instances to the contrary have occurred, and these are usually cases where it has been found that it was the duty of the original wrongdoer to anticipate and provide against such intervention, because such intervention was a thing likely to happen in the ordinary course of events. Such was the case of Lane *v.* Atlantic Works, 111 Mass. 136, where it was found by the jury that the meddling of young boys with a loaded truck left in a public street was an act which the defendants ought to have apprehended and provided against, and the verdict for the plaintiffs was allowed to stand. In the carefully expressed opinion by Mr. Justice Colt the court say: "In actions of this description, the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise." According to this statement of the law, the questions in the present case are, Was the starting of the fire by Casserly

the natural and probable consequence of the defendant's negligent act in leaving the oil upon the platform? According to the usual experience of mankind, ought this result to have been apprehended? The question is not whether it was a possible consequence, but whether it was probable, that is, likely to occur, according to the usual experience of mankind. That this is the true test of responsibility applicable to a case like this has been held in very many cases, according to which a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience. One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable. A high degree of caution might, and perhaps would, guard against injurious consequences which are merely possible; but it is not negligence, in a legal sense, to omit to do so.

There may not always have been entire consistency in the application of this doctrine; but, in addition to cases of boys meddling with things left in a public street, courts have also held it competent for a jury to find that the injury was probable, although brought about by a new agency, when heavy articles left near an opening in the floor of an unfinished building, or in the deck of a vessel, were accidentally jostled so that they fell upon persons below; McCauley *v.* Norcross, 155 Mass. 584; The Joseph B. Thomas, 81 Fed. Rep. 578; when sheep, allowed to escape from a pasture and stray away in a region frequented by bears, were killed by the bears; Gilman *v.* Noyes, 57 N. H. 627; and when a candle or match was lighted by a person in search of a gas leak, with a view to stop the escape of gas; Koelsch *v.* Philadelphia Co., 152 Penn. St. 355; and in other cases not necessary to be specially referred to. In all of these cases, the real ground of decision has been that the result was or might be found to be probable, according to common experience.

Without dwelling upon other authorities in detail, we will mention some of those in which substantially this view of the law has been stated. Davidson *v.* Nichols, 11 Allen, 514; McDonald *v.* Snelling, 14 Allen, 290; Tutein *v.* Hurley, 98 Mass. 211; Hoadley *v.* Northern Transportation Co., 115 Mass. 304; Hill *v.* Winsor, 118 Mass. 251; Derry *v.* Flitner, 118 Mass. 131; Freeman *v.* Mercantile Accident Association, 156 Mass. 351; Spade *v.* Lynn & Boston Railroad, 168 Mass. 285, and cases there cited; Cosulich *v.* Standard Oil Co., 122 N. Y. 118; Rhodes *v.* Dunbar, 57 Penn. St. 274; Hoag *v.* Lake Shore & Michigan Southern Railroad, 85 Penn. St. 293; Behling *v.* Southwest Penn. Pipe Lines, 160 Penn. St. 359; Goodlander Mill Co. *v.* Standard Oil Co., 63 Fed. Rep. 400, 405, 406; Haile *v.* Texas & Pacific Railway,

60 Fed. Rep. 557; Clark v. Chambers, 3 Q. B. D. 327; Whart. Negl. (2d ed.) §§ 74, 76, 78, 138–145, 155, 955; Cooley, Torts, 69, 70; Add. Torts, 40; Pollock, Torts, 388; Mayne, Damages, 39, 47, 48. For a recent English case involving a question of remoteness, see Engelhart v. Farrant, [1897] 1 Q. B. 240. The rule exempting a slanderer from damages caused by a repetition of his words rests on the same ground. Hastings v. Stetson, 126 Mass. 329; Shurtleff v. Parker, 130 Mass. 293; Elmer v. Fessenden, 151 Mass. 359.

Tried by this test, the defendant is not responsible for the consequences of Casserly's act. There was no close connection between it and the defendant's negligence. There was nothing to show that such a consequence had ever happened before, during the eight years covered by the plaintiff's testimony, or that there were any existing circumstances which made it probable that it would happen. It was of course possible that some careless person might come along and throw down a lighted match where a fire would be started by it. This might, indeed, have happened upon the plaintiff's own premises, or in any other place where inflammable materials were gathered. But it was not according to the usual and ordinary course of events. In failing to anticipate and guard against such an occurrence or accident, the defendant violated no legal duty which it owed to the plaintiff. What qualification, if any, of this doctrine should be made in case of the storage of high explosives, like gunpowder and dynamite, we do not now consider. See Rudder v. Koopmann, 116 Ala. 332; Kinney v. Koopmann, 116 Ala. 310; Rhodes v. Dunbar, 57 Penn. St. 274, 290.

The plaintiff, however, contends that this question should have been submitted to the jury. This course would have been necessary, if material facts had been in dispute. But where upon all the evidence the court is able to see that the resulting injury was not probable, but remote, the plaintiff fails to make out his case, and the court should so rule the same as in cases where there is no sufficient proof of negligence. McDonald v. Snelling, 14 Allen, 290, 299. In Hobbs v. London & Southwestern Railway, L. R. 10 Q. B. 111, 122, Blackburn, J. said: "I do not think that the question of remoteness ought ever to be left to a jury; that would be in effect to say that there shall be no such rule as to damages being too remote." It is common practice to withdraw cases from the jury on the ground that the damages are too remote. Hammond v. Bussey, 20 Q. B. D. 79, 89; Read v. Nichols, 118 N. Y. 224; Cuff v. Newark & New York Railroad, 6 Vroom, 17; Behling v. Southwest Penn. Pipe Lines, 160 Penn. St. 359; Goodlander Mill Co. v. Standard Oil Co., 63 Fed. Rep. 400, 405, 406; Pennsylvania Co. v. Whitlock, 99 Ind. 16; Carter v. Towne, 103 Mass. 507; Hoadley v. Northern Transportation Co., 115 Mass. 304; Hutchinson v. Boston Gas Light Co., 122 Mass. 219; Elmer v. Fessenden, 151 Mass. 359.

The plaintiff further contends that the negligence of the defendant

in keeping the oil upon the platform was concurrent with the careless act of Casserly, and that therefore it was a case where two wrongdoers acting at the same time contributed to the injurious result. But this is not a just view of the matter. The negligence of the defendant preceded that of Casserly, and was an existing fact when he intervened, just as in Lane *v.* Atlantic Works, 111 Mass. 136, the negligence of the defendants in leaving their loaded truck in the street preceded that of the boys who meddled with it.

The fact, if established, that the defendant's platform with the oil upon it constituted a public nuisance is immaterial, under the circumstances of the present case. If the plaintiff proved a nuisance, he need not go further and show that it was negligently maintained. But we have assumed the existence of negligence on the part of the defendant. Illegality on the part of a defendant does not of itself create a liability for remote consequences, and illegality on the part of a plaintiff does not of itself defeat his right to recover damages. The causal connection between the two still remains to be established. Hanlon *v.* South Boston Horse Railroad, 129 Mass. 310; Hyde Park *v.* Gay, 120 Mass. 589; Hall *v.* Ripley, 119 Mass. 135; Damon *v.* Scituate, 119 Mass. 66; Kidder *v.* Dunstable, 11 Gray, 342; Hayes *v.* Michigan Central Railroad, 111 U. S. 228, 241. In order to maintain a personal action to recover damages for a public nuisance, the plaintiff must show that his particular loss or damage was caused by the nuisance, just as in case of any other tort. Wesson *v.* Washburn Iron Co., 13 Allen, 95; 101, 103; Stetson *v.* Faxon, 19 Pick. 147, 154. And in considering the question of remoteness, it makes no difference what form of wrongdoing the action rests upon. Sherman *v.* Fall River Iron Works, 2 Allen, 524; The Notting Hill, 9 P. D. 105, 113; Mayne, Damages, 48, note.

Without considering other grounds urged by the defendant, a majority of the court is of opinion that, upon the evidence, the defendant was not bound, as a matter of legal duty, to anticipate and guard against an act like that of Casserly, he being a stranger coming upon the defendant's premises for his own purposes and in his own right.

Exceptions overruled.[1]

BROWN *v.* CUMMINGS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1863.

[*Reported* 7 *Allen*, 507.]

TORT for an assault and battery, with an allegation that by reason thereof the plaintiff lost a position as surgeon's mate in the navy, to which he was about to be appointed.

[1] See also Jennings *v.* Davis, 187 Fed. 703. — ED.

At the trial in the superior court, before Ames, J., the plaintiff was permitted, against the defendant's objection, to testify that before the assault and battery complained of he had made an application for the position of surgeon's mate; but that, being disabled by the assault and battery, for that reason he had soon afterwards withdrawn his application. He made no further attempt to show that he had lost the situation, and this evidence was not afterwards referred to by the counsel of either party, or by the court. The evidence of the plaintiff tended to show that the assault was of an unprovoked and aggravated character; and the defence proceeded wholly on the ground that the evidence on which the plaintiff relied was untrue, and that the defendant had committed no assault and battery whatever.

The jury returned a verdict for the plaintiff, with damages in the sum of $100; and the defendant alleged exceptions.

CHAPMAN, J. The question presented by the bill of exceptions is, whether the evidence objected to ought to have been rejected. If the plaintiff had a right, under his declaration, to prove the loss of the office of surgeon's mate as consequential damages, then the evidence was properly admitted; because it was pertinent evidence on that point, though it was obviously insufficient without proof of additional facts.

The rule of law is, that where special damages are not alleged in the declaration, the plaintiff can prove only such damages as are the necessary as well as proximate result of the act complained of; but where they are alleged, they may be proved so far as they are the proximate though not the necessary result. 1 Chit. Pl. (6th ed.) 441; 2 Greenl. Ev. § 256; Dickinson *v.* Boyle, 17 Pick. 78. As the declaration in this case alleges the loss of the office as special damage, the evidence was admissible, if the loss can be regarded as a proximate result of the assault and battery. So far as we have been able to find authorities on the point, (for none were cited on behalf of the plaintiff) they tend to show that it was not proximate, but remote. In Boyce *v.* Bayliffe, 1 Camp. 58, it is said to have been held that, in an action for false imprisonment, with an allegation that the plaintiff thereby lost a lieutenancy, he could not recover for the loss because it was remote. In 1 Chit. Pl. 440, the same rule of law is stated. In Moore *v.* Adam, 2 Chit. R. 198, which was an action for assault and battery, with an allegation of special damage, the plaintiff offered to prove that, in consequence of the blows given to him by the defendant, he had been driven from Alicant, where he had before carried on trade as a merchant. This was held to be too remote.

These authorities seem to us to be in conformity with the principle stated above. We do not see how the loss of an office can be proximately connected with an assault and battery as its cause. There must be intervening events which make the connection more or less remote; and it is difficult to see how the result can happen without the addition of independent causes also. It is somewhat like the case of a

merchant who should offer to prove that, in consequence of an assault and battery, he was unable to go to his store, and thereby lost the opportunity to close a particular bargain which would have been profitable; or of a farmer who should offer to prove that in consequence of such an act he was unable to gather in his crop of grain, and thereby lost it. In the present case, one of the intervening causes of the loss of the office appears to have been a voluntary act of the plaintiff's own will, and there must also have been the concurrent voluntary acts of other men. The evidence ought therefore to have been excluded.

Although this evidence was not noticed by counsel on either side in addressing the jury, or by the court in instructing them, yet it is impossible to know that it had no effect upon their verdict. After it had been admitted, against the objection of the defendant's counsel, the jury had a right to regard it as legal and material, unless they were afterwards instructed to disregard it.

Exceptions sustained.[1]

SEITH v. COMMONWEALTH ELECTRIC CO.

SUPREME COURT OF ILLINOIS, 1909.

[*Reported* 241 *Ill.* 252.]

CARTWRIGHT, C. J.[2] The important question presented by the record and argued by counsel is whether the negligence alleged was the proximate cause of the injury to the plaintiff. No mention of that question is made in the opinion of the Appellate Court, but that court must have concluded that the negligence of the defendant was the proximate cause of the injury, since there could be no recovery on account of such negligence unless there was a causal connection between the negligence and the injury. The rules for determining whether a negligent act or omission is the proximate cause of an injury are well established and have been applied by different courts in numerous cases to different conditions of fact. There has been practically no difference of opinion as to what the rules are, and they may be briefly stated as follows: The negligent act or omission must be the cause which produces the injury, but it need not be the sole cause nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time which, in combination with it, causes the injury, or if it sets in motion a chain of circumstances and operates on them in a continuous sequence, unbroken by any new or independent cause. The question is not determined by the existence or non-existence of intervening events,

[1] See also Ross v. Western U. T. Co., 81 Fed. 676. — ED.

[2] The statement of the evidence is omitted. — ED.

but by their character and the natural connection between the original act or omission and the injurious consequences. To constitute proximate cause the injury must be the natural and probable consequence of the negligence, and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence. It is not necessary that the person guilty of a negligent act or omission might have foreseen the precise form of the injury, but when it occurs it must appear that it was a natural and probable consequence of his negligence. If the negligence does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent independent act of a third person, the two are not concurrent and the existence of the condition is not the proximate cause of the injury. Where the intervening cause is set in operation by the original negligence, such negligence is still the proximate cause, and where the circumstances are such that the injurious consequences might have been foreseen as likely to result from the first negligent act or omission, the act of the third person will not excuse the first wrongdoer. When the act of a third person intervenes which is not a consequence of the first wrongful act or omission and which could not have been foreseen by the exercise of reasonable diligence and without which the injurious consequence could not have happened, the first act or omission is not the proximate cause of the injury. The test is whether the party guilty of the first act or omission might reasonably have anticipated the intervening cause as a natural and probable consequence of his own negligence, and if so, the connection is not broken; but if the act of the third person which is the immediate cause of the injury is such as in the exercise of reasonable diligence would not be anticipated and the third person is not under the control of the one guilty of the first act or omission, the connection is broken and the first act or omission is not the proximate cause of the injury. One phase of the rule was stated in Chicago Hair and Bristle Co. *v.* Mueller, 203 Ill. 558, as follows: "If the negligent act and the injury are known, by common experience, to be usual in consequence, and the injury such as is liable, in the ordinary course of events, to follow the act of negligence, it is a question of fact for the jury whether the negligence was the proximate cause of the injury;" and there is a general review of the subject in Thompson on Negligence, chap. 5. In Braun *v.* Craven, 175 Ill. 401, the court said: "The principle is, damages which are recoverable for negligence must be such as are the natural and reasonable result of defendant's acts, and the consequences must be such as in the ordinary course of things would flow from the acts and could be reasonably anticipated as a result thereof." In Pollock on Torts the author declares that the only rule tenable, on principle, where the liability is founded solely on negligence, is contained in the statement "that a person is expected to anticipate and guard against all reasonable con-

sequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur." (Webb's Pollock on Torts, p. 45.) Judge Cooley states the rule as follows: "If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause and refuse to trace it to that which was more remote." (Cooley on Torts, (3d ed.) 99.) In Wharton on Negligence (§ 134) is found the following question and answer: "Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent, responsible human action." The Supreme Court of the United States, in the case of Milwaukee and St. Paul Railroad Co. *v.* Kellogg, 94 U. S. 469, said: "The question always is, was there an unbroken connection between the wrongful act and the injury,— a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

The principles on which the question of proximate cause depends are illustrated by the facts of various cases in this court. In Village of Carterville *v.* Cook, 129 Ill. 152, a much used sidewalk elevated six feet above the ground was unprotected by railing or other guard, and by the inadvertent or negligent shoving by one boy of another boy against the plaintiff, the plaintiff was pushed from the sidewalk and injured. That was plainly a case where the village ought to have anticipated the consequences of its negligence. In American Express Co. *v.* Risley, 179 Ill. 295, the express company was held liable for the consequences of placing a chute crosswise on an express car, because it could have been foreseen, by the exercise of ordinary care, that the injury which followed might result from the act. In Garibaldi & Cuneo *v.* O'Connor, 210 Ill. 284, where the plaintiff stepped upon a banana and fell, it was held that when the intervening cause of an injury could reasonably have been anticipated, the original negligent act, if it contributed to an injury, may be regarded as the proximate cause. In Elgin, Aurora and Southern Traction Co. *v.* Wilson, 217 Ill. 47, the declaration charged defendant with negligence in failing to have a switch lever locked and in failing to have the same guarded at an amusement park. There was no lock on the switch and the switch tender left his post for the attractions of a game of ball. It was held proper to submit to the jury the question whether the defendant had discharged its duty toward a passenger, although the mischievous act of a boy in changing the switch contributed to the injury.

It was a case where the intervening cause of changing an unlocked and unguarded switch might reasonably have been anticipated. In Illinois Central Railroad Co. *v.* Siler, 229 Ill. 390, the defendant negligently set a fire, and the owner of a house, in an effort to extinguish the fire, received an injury from which she died. The defendant was bound to anticipate, when the fire started, that the decedent would try to put it out, and if in so doing, with reasonable care and caution, she was injured, the setting of the fire was the proximate cause of the injury, as a result which might be anticipated. Judge Thompson illustrates the rule by supposing a similar case. (1 Thompson on Negligence, § 64.) In True & True Co. *v.* Woda, 201 Ill. 315, it was regarded as a question of fact whether the negligence of the defendant in piling lumber on the sidewalk in a public street where he knew the children of the neighborhood were in the habit of playing was the proximate cause of an injury, and this was upon the ground that the defendant should have known the children would be likely to climb on the lumber at play and be injured. In Siegel, Cooper & Co. *v.* Trcka, 218 Ill. 559, where the defendants were guilty of negligence in the construction of an elevator shaft and a boy fourteen years old was thrown down by another boy, it was considered that the two acts of negligence both contributed to the result, and clearly the defendant might reasonably have anticipated what actually happened in the use of the elevator.

On the other hand, in Hullinger *v.* Worrell, 83 Ill. 220, in an action on the case against a sheriff for negligence in suffering a prisoner to escape, the sheriff was held not liable for damages resulting from an assault by the prisoner on the plaintiff, because the assault was not the natural and probable consequence of permitting the prisoner to escape from custody, and not being anticipated was not the proximate result. In City of Rockford *v.* Tripp, in the same volume, page 247, where a horse with a cutter became frightened and ran away, and in passing where a team was hitched to a post set by the city for a hitching post, frightened the team and caused the team to break the post and run away and they ran over a person in the street, it was held that a defect in the post was not the proximate cause of the injury. In Wolff Manf. Co. *v.* Wilson, 152 Ill. 9, a barber's post insecurely fastened stood near the outer edge of a sidewalk, and the driver of a team in backing his wagon knocked the post over, injuring the plaintiff. The post, although not fastened as it should have been, would not have caused an injury but for the act of the driver in backing against it, and it was held the intervening cause was the proximate cause of the injury. In Braun *v.* Craven, *supra*, the court affirmed the judgment of the Appellate Court reversing the judgment of the trial court without remanding the cause, on the ground that the condition of the plaintiff could not have been reasonably anticipated as a result of the defendant's negligence.

Applying the rules of law to this case, it is clear that the defendant might reasonably anticipate, in case a wire should fall upon the sidewalk or where persons using the sidewalk or roadway would be likely to be injured, that a policeman or some other person might attempt to remove it to prevent injury, and if in so doing, or as a result of the policeman's act, some other person should be injured the defendant would be liable, since such effort to remove the cause of danger might naturally be anticipated. Of that character are the cases relied upon to sustain the judgment. (Kansas City *v.* Gilbert, 65 Kan. 469; Smith *v.* M. and K. Telephone Co., 113 Mo. App. 429; Citizens' Telephone Co. *v.* Thomas, (Tex.) 99 S. W. Rep. 879.) The defendant would be liable although there was some intervening cause, if it were such as would naturally be anticipated as the result of the wire falling to the ground, but it seems inconceivable that the defendant ought to have anticipated that a policeman would throw the wire upon the plaintiff by striking it with his club when it was lying where no injury would be done by it either to a person on the sidewalk or the roadway. There is no evidence tending in the slightest degree to prove that the policeman struck the wire for the purpose of removing it as a source of danger. He testified that he did not touch it and told the plaintiff to get away from it; but assuming, as we are bound to do, that the testimony of the children was true and that he struck the wire and knocked it toward the sidewalk, that testimony did not even remotely tend to prove that he was attempting to remove the wire so as to prevent injurious consequences. The injury to the plaintiff followed as a direct and immediate consequence of the independent act of the policeman, and but for such act any negligence of the defendant would have caused no injury to the plaintiff. In the case of Harton *v.* Forest City Telephone Co., 59 S. E. Rep. (N. C.) 1022, the telephone company negligently maintained a pole in a dangerous condition until it fell across a highway. Three persons passing in a hack set the pole up again in the same hole and propped it with a stick six to eight feet long, procured from a woodpile nearby. The pole afterward fell and killed the plaintiff's daughter, who was in a buggy with the plaintiff in the road, and the court held that there was no liability, since the negligence of the telephone company was not the proximate cause of the injury. If it could have been argued in that case that the telephone company might reasonably have anticipated the removal of the pole from the highway and the re-setting of it, no such argument can apply to the act of the policeman. The wire was lying between the sidewalk and the roadway, where it would injure no one, and the evidence most favorable to the plaintiff is, that the policeman struck it with his club and threw it upon the plaintiff as he was passing upon the sidewalk. The negligence of the defendant produced a condition which made the injury possible, but the injury would not have occurred but for the independent act of the policeman. That act was an independent cause of the in-

jury by one for whose act the defendant was not responsible and by one over whom it had no control. It follows that the defendant was not liable for such act, and the negligence alleged and which the evidence tended to prove, was not the proximate cause of the injury. The court ought therefore to have given the instruction directing a verdict of not guilty.

The judgments of the Appellate Court and circuit court are reversed and the cause is remanded to the circuit court.

Reversed and remanded.[1]

VICKERS, J., dissenting: I am not in accord with the conclusion reached by the majority opinion. The judgment is reversed because the trial court refused to direct a verdict for appellant. The conclusion is based on the assumption that there is no evidence fairly tending to show that the injury might reasonably have been anticipated from the negligence of appellant.

The majority opinion, after stating the facts and reviewing numerous authorities, proceeds as follows: "Applying the rules of law to this case, it is clear that the defendant might reasonably anticipate, in case a wire should fall upon the sidewalk or where persons using the sidewalk or roadway would be likely to be injured, that a policeman or some other person might attempt to remove it to prevent injury, and if in so doing, or as a result of the policeman's act, some other person should be injured the defendant would be liable, since such effort to remove the cause of danger might naturally be anticipated."

With the rule announced in the above quotation I have not the slightest quarrel. It is difficult to see how it is legally or logically possible to avoid a conclusion directly opposite to the one reached in the majority opinion consistent with the rule laid down in the quotation which I have made. The sentences immediately following the quotation show the manner in which the majority opinion seeks to avoid the logical conclusion which seems to me ought necessarily to follow from the premises previously laid down. Those sentences are as follows: "The defendant would be liable although there was some intervening cause, if it were such as would naturally be anticipated as the result of the wire falling to the ground, but it seems inconceivable that the defendant ought to have anticipated that a policeman would throw the wire upon the plaintiff by striking it with his club when it was lying where no injury would be done by it either to a person on the sidewalk or the roadway. . . . The wire was lying between the sidewalk and the roadway, where it would injure no one, and the evidence most favorable to the plaintiff is, that the policeman struck it with his club and threw it upon the plaintiff as he was passing upon the sidewalk."

I am wholly unable to see how this language can be reconciled with the quotation first made from the majority opinion. In the first quo-

[1] See also Brown v. Chesapeake & O. Ry., 135 Ky. 798, 123 S. W. 298. — ED.

tation it is said that the defendant ought to anticipate that the policeman might attempt to remove the wire and injure some one, and for an injury thus caused the defendant would be liable. In the second quotation it is said that if a policeman should strike the wire with his club while it was lying where it would do no injury to any one on the sidewalk, it is inconceivable that the defendant could have anticipated an injury thus brought about. What is it that distinguishes the situation presented in the first quotation from that implied in the second? Certainly the fact that the policeman used his club instead of his hands or feet to remove the live wire is not sufficient to render the liability "inconceivable" in the last proposition and "clear" in the first. Does the fact mentioned in the second proposition, that the wire was lying where no injury would be done by it to a person on the sidewalk, make the liability inconceivable? While the majority opinion does not say so in so many words, yet there is an intimation that the wire was not immediately on the sidewalk, and for this reason the policeman would not have attempted to remove it. If this be conceded it does not help the situation. Suppose the policeman did use poor judgment in deciding to remove the wire or in selecting the means to accomplish that purpose,— or, to put it still stronger, suppose the policeman was guilty of negligence in attempting to remove the wire,— then the utmost that can be claimed is that the policeman's negligence operated jointly with the negligence of appellant in producing the injury, and if this view be taken, under the authorities cited in the majority opinion appellant is liable. If the policeman, of his own malice or wantonness, threw the wire on appellee and intentionally injured him appellant would not be liable. There is, however, not a particle of evidence to sustain that theory and I do not understand the majority opinion to proceed upon that hypothesis. The negligence of appellant is conclusively settled by the judgment of the Appellate Court. There is no pretense that appellee was guilty of contributory negligence. At least, if that question was ever in the case, it is likewise settled by the judgment of affirmance by the Appellate Court. The only thing left, then, is the question of fact whether the injury resulted from causes which ought to have been reasonably anticipated by appellant. Under the rule first above quoted from the majority opinion there ought to be no doubt as to this question. The injury occurred by the attempt of a policeman in good faith to remove a danger from a public highway, placed there by the negligence of appellant. Applying the law to these facts, I think appellant is liable.

Mr. Justice CARTER, also dissenting.

30722

SCHWARTZ v. CALIFORNIA GAS & ELECTRIC CORPORATION.

[SUPREME COURT OF CALIFORNIA, 1912.]

[*Reported* 163 *Cal.* 398.]

PER CURIAM. This action was brought to recover damages for injuries to a horse known as "Joe Terry" belonging to plaintiff, caused, it is alleged, by the horse stepping upon or against an insulator dropped by an employee of defendants upon a tract of land in Yolo County known as the "Van Zee Place," occupied by plaintiff at the time of such injuries. The jury gave a verdict in favor of plaintiff for the sum of $6,475, for which amount judgment was entered. An appeal was taken by defendants from the judgment and from an order denying their motion for a new trial. Two decisions have been rendered on these appeals by the district court of appeal for the third district, the judgment and order being reversed by the first decision on account of error of the trial court in refusing an instruction as requested by defendants and giving the same in a modified form, and a rehearing having been granted by said court, the judgment and order were affirmed by the second decision. An application for a hearing in this court was then granted.

We are of the opinion that the first decision of the district court of appeal was correct. It is essential to a proper understanding of the question presented in the matter of said instruction that a statement be made as to some of the facts.

The defendants maintained and operated an electric transmission line, consisting of poles, cross-arms, wires and insulators, along certain highways in Yolo County, and the line passed the "Van Zee Place" just outside the city of Woodland. In the summer and early autumn of the year 1906 the line was reconstructed by defendants, new insulators put in on many poles, and every alternate pole removed, making the distance between poles 264 feet, instead of 132 feet, which was the distance prior to the reconstruction. At the time of this work the "Van Zee Place" was occupied by one L. E. Hutchings. A portion of this place consisted of an inclosed parcel of land fronting on the road, on which was a house, and another adjoining inclosed parcel on which was a barn. The land inclosed with the barn was known as the barnyard or corral. The land inclosed with the house was known as the house-yard and old vineyard. The vineyard portion fronted on the road and contained some ten or twelve rows of vines, varying, according to the testimony of Mr. Schwartz, the husband of plaintiff, from two inches to three feet in height. The inclosed portion containing the vineyard was not used by Mr. Hutchings for stock. Some time in November,

1906, plaintiff leased from Mr. Hutchings the two parcels of land we have referred to, and went into occupancy thereof. On April 10, 1907, plaintiff's husband turned the horse into this old vineyard portion while his stall was being cleaned. A few minutes later, the stall having been cleaned, he went after the horse to take him back. He testified: "As I started to halter him he bit at me and I stepped back. I stepped back and corrected him for attempting to bite me. I held the halter for him to put his nose in, and the horse, in stepping back to put his nose in the halter, moved back and came in contact with something, which I found afterwards was a broken insulator." The insulator was similar to those in use on defendants' line at the time the reconstruction work was done, some of which were then removed. They had an eleven-inch porcelain top, shaped something like a saucer, and a glass center about nine inches long, and weighed about twelve pounds. Mr. Schwartz said that the saucer part of this insulator was whole and laid next to the ground. The result of the contact of the horse with this insulator, the glass part of which was broken, was, according to Mr. Schwartz, that the horse was severely cut on the right hind foot between the hoof and the fetlock. The horse was a stallion and valuable only for breeding purposes, and there was testimony sufficient to sustain a conclusion that he was thereby rendered useless for such purposes. There was testimony given by one William Weight, who was over eighty years of age, and who was employed by Hutchings on the "Van Zee Place" at the time of such reconstruction work in the summer and autumn of 1906, to the effect that he saw one of the men engaged in such work drop an insulator from the cross-arm of one of the poles into this vineyard, and that the insulator fell into the vineyard at the northwest corner, some seven or eight feet from the fence. This testimony was given some two years after the accident to the horse. He said that he saw the insulator in the vineyard many times thereafter, "passed it nearly every day," but did not pick it up because it did no harm there, and that they were not using the vineyard for stock. It was clearly established that the horse was injured in the northwest corner of the vineyard, and Mr. Schwartz said that the insulator was at a point two or three feet from the north fence and between six and ten feet from the west fence, which was the road fence. Evidence introduced by the defendants was very clear to the effect that at the time this work was done by the defendants, the nearest pole to the northwest corner of the vineyard on one side was sixty feet and on the other side seventy-two feet. Mr. Hutchings, then and for many years prior occupant of the place, testified in effect that there had been no change in the poles except that every other pole was taken out, and his testimony and that of Mr. Ashley, taken together, is clearly to the effect already stated. This evidence was in no way contradicted except in so far as it was inferentially contradicted by the evidence of Mr. Weight, to which we have already referred.

In the light of these facts, which we have stated as strongly in favor of plaintiff as the record warrants, the district court of appeal in its first opinion declared in part as follows: —

"Many points are made for a reversal of the judgment. Most of them are without merit, some of them probably involve error without prejudice, but one necessitates, as we view it, a new trial of the action.

"Defendants requested the court to instruct the jury as follows: 'You cannot find for the plaintiff in this case unless you believe from the evidence:

"1. That plaintiff's horse was injured by an insulator, the property of defendants. 2. That the employees of defendants negligently placed said insulator on the premises where it is claimed said horse was injured and *at the point where the evidence shows said horse was in fact injured.*' As given by the court the second subdivision was modified to read as follows: 'That the employees of defendants negligently placed or permitted said insulator to remain on the premises where it is claimed said horse was injured, *and at a point where the evidence shows some injury might result.*'

"In the language of appellants: 'As proposed, this instruction limited responsibility to the placing of the insulator at the point where the horse was injured. The modification made the defendants liable if they placed it anywhere on the premises.'

"The proposed instruction was based upon the theory that an intervening, independent agency may have been the proximate cause of the injury. It seems plain, that if appellants carelessly dropped the insulator upon the premises and did not remove it they would be guilty of negligence, but after it was dropped if somebody else picked it up and moved it to this spot where the damage was done, it was the negligence of the latter that proximately caused the injury.

"It would not be a case of correlative and concurring causes, but of proximate and remote agencies independent of each other. The rule is well settled that an injury is not actionable which would not have resulted from the act of negligence, except for the interposition of an independent cause. (Chicago etc. Ry. Co. *v.* Elliott, 55 Fed. 949, [20 L. R. A. 582, 5 C. C. A. 347]; Cole *v.* German Savings and Loan Society, 124 Fed. 115, [63 L. R. A. 416, 59 C. C. A. 593]; Western Union Tel. Co. *v.* Schriver, 141 Fed. 550, [4 L. R. A. (N. S.) 678, 72 C. C. A. 596].)

"In the Cole case, it appears that the plaintiff entered and passed along a hall in the building of the defendant to take the elevator, the well or shaft of which opened into the hall. A boy, who was a stranger to her and to the defendant, hurried past her in the hall, pushed the sliding door of the well of the elevator, which was open from one to ten inches, back as far as it would go, and stepped back. The plaintiff supposed the boy was the operator of the elevator, and stepped in. The elevator was at an upper floor in charge of its regular operator, and

plaintiff fell to the bottom of the well and was injured. The hall was so dark that it was difficult, but not impossible, to see the elevator when it was at the lower floor, and when it was not there nothing but darkness was visible in the well. It was held that the negligent acts and omissions of the defendant were not, and those of the strange boy were, the proximate cause of the injury. 'The latter constituted an independent intervening cause which interrupted the natural sequence of events between the negligence of the defendant and the injury of the plaintiff, insulated the defendant's negligence from the plaintiff's hurt, broke the causal connection between them and produced the injury.' The negligence of the defendant in that case, as stated by the court, consisted of permitting such a degree of darkness in the hall, of allowing boys to ride upon and sometimes operate the elevator, of neglecting to provide a lock for the door which would prevent any one from unlocking it from the outside and of permitting the door to stand open from one to ten inches. Defendant there was indeed guilty of gross negligence, but it was held not to be the proximate cause of the injury.

"In Berry v. San Francisco & N. P. R. R. Co., 50 Cal. 435, it was held that the injury done to plaintiff's wheat by the hogs of third persons was not the direct damage resulting from the trespass of defendant in destroying a portion of plaintiff's fences by reason of which the hogs obtained access to said premises.

"In Loftus v. De Hail, 133 Cal. 214, [65 Pac. 379], the action was brought to recover damages for injuries sustained by the plaintiff, an infant seven years of age, from falling into a cellar of defendants, situated on a vacant lot in the city of Los Angeles. The defendants were the owners of the lot, which was located in a populous and thickly settled quarter of the city. Upon the lot had stood a house, which had been removed, leaving upon the premises a cellar partially filled with debris. The premises were left in an open and unguarded condition. The plaintiff lived in the neighborhood of the lot, and, upon the day of the accident, was engaged with other children in playing around the cellar, and while so engaged was by her younger brother pushed into the cellar, sustaining the injuries complained of. It was held by the court that his act was the proximate cause of the injury, and that 'it was not in her play and as part of her play and in ignorance of the danger of her play, but she was injured by the violence of her little brother in a matter apart.' The foregoing are a few of many cases illustrating the operation of an independent proximate cause producing injury, and they seem to be in harmony with the principle embodied in said proposed instruction here.

"Of course, if there were no evidence in the record tending to support said theory the court's action would be adjudged entirely without prejudice. While there was no direct evidence that any third party moved said insulator, circumstances do appear from which a rational

inference might be drawn to that effect, and therefore it was a proper question to submit to the jury. The only witness who testified that he saw the insulator fall from the pole was one William Weight, an old man past eighty, who admitted his eyesight was bad. He testified that he was employed on the 'Van Zee' Place during the summer and forepart of the fall of 1906, when it was occupied by Lee Hutchings. 'During that time men worked on the electric pole line. They were changing insulators and putting up wires and one of the men dropped an insulator into the northwest corner of the vineyard. The man was on a cross-bar when he dropped the insulator, which was as large as a cuspidor.' Other evidence shows clearly that the nearest pole to the northwest corner of the vineyard was sixty feet, and in another direction there had been one seventy-two feet from the corner. The insulator weighed twelve pounds and the poles were thirty feet high. It was, therefore, quite a probable inference that within the eight or nine months intervening before the accident some other party moved the insulator, as it could not have 'dropped' to a point on the ground sixty or seventy feet from the foot of the pole.

"To this complaint by appellants of the action of the court in refusing said instruction the only answer made by respondent is as follows: 'The modification of instruction 18 was proper because the instruction as proposed was erroneous in that it was an instruction as to the facts. The language of subdivision 2 of the instruction was a straight statement that the evidence shows that the horse was not injured.' In this respondent is clearly in error. The instruction is altogether hypothetical, it does not assume any fact as proven, but states what must be shown to justify a verdict for plaintiff. The point seems to be a vital one in the case and it is believed that the defendants were entitled to the instruction and for this reason the judgment and order are reversed."

Learned counsel for plaintiff ably and earnestly assailed this opinion and the consequent judgment of reversal in their petition for a rehearing in the district court of appeal, and in their brief filed subsequently in this court, but we believe that it correctly disposes of this appeal. Some of the points so made by counsel are sufficiently disposed of by such opinion. We are of the opinion that the requested instruction was not an instruction as to the facts, and that it correctly stated the law applicable in view of the testimony. We are satisfied that none of the instructions given the jury substantially covered the subject matter of the requested instruction, in so far as the same referred to the question of an intervening, independent agency. We do not consider Merrill v. Los Angeles etc. Co., 158 Cal. 499, [139 Am. St. Rep. 134, 111 Pac. 534], in any way opposed to our conclusion herein.

The judgment and order denying a new trial are reversed.

Mr. Justice SLOSS, deeming himself disqualified, does not participate herein. *Rehearing denied.*

125742

CLARK v. CHAMBERS.

HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION, 1878.

[*Reported* 3 *Q. B. D.* 327.]

COCKBURN, C. J. This is a case of considerable nicety, and which, so far as the precise facts are concerned, presents itself for the first time.

The defendant is in the occupation of premises which abut on a private road leading to certain other premises as well as to his; it consists of a carriage road and a footway. The soil of both is the property of a different owner; the defendant has no interest in it beyond the right of way to and from his premises.

The defendant uses his premises as a place where athletic sports are carried on by persons resorting thereto for that purpose for their own amusement. His customers finding themselves annoyed by persons coming along the road in question in carts and vehicles and stationing themselves opposite to his grounds and overlooking the sports, the height of the carts and vehicles enabling them to see over the fence, the defendant erected a barrier across the road for the purpose of preventing vehicles from getting as far as his grounds.

This barrier consisted of a hurdle set up lengthways next to the footpath, then two wooden barriers armed with spikes, commonly called chevaux de frise, then there was left an open space through which a vehicle could pass; then came another large hurdle set up lengthways, which blocked up the rest of the road. At ordinary times the space between the two divisions of the barrier was left open for vehicles to pass which might be going to any of the other premises to which the road in question led. But at the times when the sports were going on, a pole attached by suitable apparatus was carried across from the one part of the barrier to the other, and so the road was effectually blocked.

Amongst the houses and grounds to which this private road led was that of a Mr. Bruen. On the evening on which the accident which gave rise to the present action occurred the plaintiff, who occupied premises in the immediate neighbourhood, accompanied Mr. Bruen, by the invitation of the latter, to Bruen's house. It was extremely dark, but being aware of the barrier and the opening in it, they found the opening, the pole not being set across it, and passed through it in safety; but on his return, later in the evening, the plaintiff was not equally fortunate. It appears that, in the course of that day or the day previous, some one had removed one of the chevaux de frise hurdles from the place where it had stood, and had placed it in an upright position across the footpath. Coming back along the middle of the road, the plaintiff,

feeling his way, passed safely through the opening in the centre of the barrier; having done which, being wholly unaware, it being much too dark to see, that there was any obstruction on the footpath, he turned on to the latter, intending to walk along it the rest of the way. He had advanced only two or three steps when his eye came into collision with one of the spikes, the effect of which was that the eye was forced out of its socket. It did not appear by whom the chevaux de frise hurdle had been thus removed, but it was expressly found by the jury that this was not done by the defendant or by his authority. The question is, whether the defendant can be held liable for the injury thus occasioned. It is admitted that what the defendant did in erecting this barrier across the road was unauthorized and wrongful, and it is not disputed that the plaintiff was lawfully using the road. There is no ground for imputing to him any negligence contributing to the accident. The jury have expressly found, in answer to a question put to them by me, that the use of the chevaux de frise in the road was dangerous to the safety of persons using it. The ground of defense in point of law taken at the trial and on the argument on the rule was, that, although if the injury had resulted from the use of the chevaux de frise hurdle as placed by the defendant on the road, the defendant, on the facts as admitted or as found by the jury, might have been liable; yet, as the immediate cause of the accident was not the act of the defendant, but that of the person, whoever he may have been, who removed the spiked hurdle from where the defendant had fixed it and placed it across the footway, the defendant could not be held liable for an injury resulting from the act of another. On the part of the plaintiff it was contended that as the act of the defendant in placing a dangerous instrument on the road had been the primary cause of the evil, by affording the occasion for its being removed and placed on the footpath, and so causing the injury to the plaintiff, he was responsible in law for the consequences. Numerous authorities were cited in support of this position. The first is the case of Scott *v.* Shepherd, 3 Wils. 403; 2 W. Bl. 892. In that case the defendant threw a lighted squib into a market house where several persons were assembled. It fell upon a standing, the owner of which, in self-defence, took it up and threw it across the market house. It fell upon another standing, the owner of which, in self-defence, took it up and threw it to another part of the market house, and in its course it struck the plaintiff, and exploded and put out his eye. The defendant was held liable, although without the intervention of a third person the squib would not have injured the plaintiff.

In Dixon *v.* Bell, 5 M. & S. 198, the defendant, having left a loaded gun with another man, sent a young girl to fetch it, with a message to the man in whose custody it was to remove the priming, which the latter, as he thought, did, but, as it turned out, did not do effectually. The girl brought it home, and, thinking that the priming having been

removed the gun could not go off, pointed it at the plaintiff's son, a child, and pulled the trigger. The gun went off and injured the child. The defendant was held liable, "as by this want of care," says Lord Ellenborough — that is, by leaving the gun without drawing the charge or seeing that the priming had been properly removed — "the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible. It is a hard case, undoubtedly; but I think the action is maintainable."

In Ilott *v.* Wilkes, 3 B. & A. 304 — the well-known case as to spring-guns — it became unnecessary to determine how far a person setting spring-guns would be liable to a person injured by such a gun going off, even though such person were a trespasser, inasmuch as the plaintiff, having had notice that spring-guns were set in a particular wood, had voluntarily exposed himself to the danger. But both Mr. Justice Bayley and Mr. Justice Holroyd appear to have thought that without such notice the action would have lain, the use of such instruments being unreasonably disproportioned to the end to be obtained, and dangerous to the lives of persons who might be innocently trespassing. Looking to their language, it can scarcely be doubted that if, instead of injuring the plaintiff, the gun which he caused to go off had struck a person passing lawfully along a path leading through the wood, they would have held the defendant liable.

In Jordin *v.* Crump, 8 M. & W. 782, the use of dog-spears was held not illegal; but there the injury done to the plaintiff's dog was alone in question. If the use of such an instrument had been productive of injury to a human being, the result might have been different.

In Illidge *v.* Goodwin, 5 C. & P. 192, the defendant's cart and horse were left standing in the street without any one to attend to them. A person passing by whipped the horse, which caused it to back the cart against the plaintiff's window. It was urged that the man who whipped the horse, and not the defendant, was liable. It was also contended that the bad management of the plaintiff's shopman had contributed to the accident. But Tindal, C. J., ruled that, even if this were believed, it would not avail as a defence. "If," he says, "a man chooses to leave a cart standing on the street, he must take the risk of any mischief that may be done." Lynch *v.* Nurdin, 1 Q. B. 29, is a still more striking case. There, as in the former case, the defendant's cart and horse had been left standing unattended in the street. The plaintiff, a child of seven years of age, playing in the street with other boys, was getting into the cart when another boy made the horse move on. The plaintiff was thrown down, and the wheel of the cart went over his leg and fractured it. A considered judgment was delivered by Lord Denman. He says, "It is urged that the mischief was not produced by the mere negligence of the servant as asserted in the declaration, but at most by that negligence in combination with two other active causes, the

advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart and committing a trespass on the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell on it at any length. For if I am guilty of negligence in leaving anything dangerous where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." And then, by way of illustration, the Chief Justice puts the case of a gamekeeper leaving a loaded gun against the wall of a play-ground where school boys were at play, and one of the boys in play letting it off and wounding another. "I think it will not be doubted," says Lord Denman, "that the gamekeeper must answer in damages to the wounded party." "This," he adds, "might possibly be assumed as clear in principle, but there is also the authority of the present Chief Justice of the Common Pleas in its support in Illidge *v.* Goodwin." It is unnecessary to follow the judgment in the consideration of the second part of the case, namely, whether the plaintiff, having contributed to the accident by getting into the cart, was prevented from recovering in the action, as no such question arises here. In Daniels *v.* Potter, 4 C. & P. 262, the defendants had a cellar opening to the street. The flap of the cellar had been set back while the defendants' men were lowering casks into it, as the plaintiff contended, without proper care having been taken to secure it; the flap fell and injured the plaintiff. The defendant maintained that the flap had been properly fastened, but also set up as a defence that its fall had been caused by some children playing with it. But the only question left to the jury by Tindal, C. J., was whether the defendant's men had used reasonable care to secure the flap. His direction implies that in that case only would the intervention of a third party causing the injury be a defence.

The cases of Hughes *v.* Macfie, 2 H. & C. 744; 33 L. J. (Ex.) 177, and Abbott *v.* Macfie, 2 H. & C. 744; 33 L. J. (Ex.) 177, two actions arising out of the same circumstances, and tried in the Passage Court at Liverpool, though at variance with some of the foregoing, so far as relates to the effect on the plaintiff's right to recover where his own act as a trespasser has contributed to the injury of which he complains, is in accordance with them as respects the defendant's liability for his own act, where that act is the primary cause, though the act of another may have led to the immediate result.

The defendants had a cellar opening to the street. Their men had taken up the flap of the cellar for the purpose of lowering casks into it, and, having reared it against the wall nearly upright with its lower face, on which there were cross-bars, towards the street, had gone away. The plaintiff in one of the actions, a child five years old, got upon the

cross-bars of the flap, and in jumping off them brought down the flap on himself and another child, the plaintiff in the other action, and both were injured. It was held, that while the plaintiff whose act had caused the flap to fall could not recover, the other plaintiff who had been injured could, provided he had not been playing with the other so as to be a joint actor with him.

Bird *v.* Holbrook, 4 Bing. 628, is another striking case, as there the plaintiff was undoubtedly a trespasser. The defendant being the owner of a garden, which was at some distance from his dwelling-house, and which was subject to depredations, had set in it without notice a spring-gun for the protection of his property. The plaintiff, who was not aware that a spring-gun was set in the garden in order to catch a pea-fowl, the property of a neighbour, which had escaped into the garden, got over the wall, and his foot coming, in his pursuit of the bird, into contact with the wire which communicated with the gun, the latter went off and injured him. It was held, though his own act had been the immediate cause of the gun going off, yet that the unlawful act of the defendant in setting it rendered the latter liable for the consequences.

In the course of the discussion a similar case of Jay *v.* Whitfield, 3 B. & Ad. 308, at p. 644, was mentioned — tried before Richards, C. B., — in which a plaintiff who had trespassed upon premises in order to cut a stick and had been similarly injured, had recovered substantial damages, and no attempt had been made to disturb the verdict.

In Hill *v.* New River Company, 9 B. & S. 308, the defendants created a nuisance in a public highway by allowing a stream of water to spout up open and unfenced in the road. The plaintiff's horses passing along the road with his carriage took fright at the water thus spouting up, and swerved to the other side of the road. It so happened that there was in the road an open ditch or cutting, which had been made by contractors who were constructing a sewer, and which had been left unfenced and unguarded, which it ought not to have been. Into this ditch or cutting, owing to its being unfenced, the horses fell and injured themselves and the carriage. It was contended that the remedy, if any, was against the contractors; but it was held that the plaintiff was entitled to recover against the company.

In Burrows *v.* March Gas and Coke Company, Law Rep. 7 Ex. 96, it was held in the Exchequer Chamber, affirming a judgment of the Court of Exchequer, that where, through a breach of contract by the defendants in not serving the plaintiff with a proper pipe to convey gas from their main into his premises, an escape of gas had taken place, whereupon the servant of a gasfitter at work on the premises having gone into the part of the premises where the escape had occurred, with a lighted candle, and examining the pipe with the candle in his hand, an explosion took place, by which the premises were injured, the defendants were liable, though the explosion had been immediately

caused by the imprudence of the gasfitter's man in examining the pipe with a lighted candle in his hand.

In Collins v. Middle Level Commissioners, Law Rep. 4 C. P. 279, the defendants were bound under an Act of Parliament to construct a cut with proper walls, gates, and sluices, to keep out the waters of a tidal river, and also a culvert under the cut, to carry off the drainage of the lands lying east of the cut, and to keep the same open at all times. In consequence of the defective construction of the gates and sluices, the waters of the river flowed into the cut, and, bursting its western bank, flooded the adjoining lands. The plaintiff and other proprietors on the eastern side closed the culvert, and so protected their lands; but the proprietors on the western side, to lessen the evil to themselves, reopened the culvert, and so increased the overflow on the plaintiff's land, and caused injury to it. The defendants sought to ascribe the injury to the act of the western proprietors in removing the obstruction which those on the other side had placed at the culvert. But it was held that the negligence of the defendants was the substantial cause of the mischief. "The defendants," says Mr. Justice Montague Smith, "cannot excuse themselves from the natural consequences of their negligence by reason of the act, whether rightful or wrongful, of those who removed the obstruction placed in the culvert under the circumstances found in this case." "The primary and substantial cause of the injury," says Mr. Justice Brett, "was the negligence of the defendants, and it is not competent to them to say that they are absolved from the consequences of their wrongful act by what the plaintiff or some one else did." — "I cannot see how the defendants can excuse themselves by urging that the plaintiff was prevented by other wrongdoers from preventing a part of the injury."

The case of Harrison v. Great Northern Railway, 3 H. & C. 231; 33 L. J. (Ex.) 266, belongs to the same class. The defendants were bound under an Act of Parliament to maintain a delph or drain with banks for carrying off water for the protection of the adjoining lands. At the same time certain commissioners, appointed under an Act of Parliament, were bound to maintain the navigation of the river Witham, with which the delph communicated. There having been an extraordinary fall of rain, the water in the delph rose nearly to the height of its banks, when one of them gave way and caused the damage of which the plaintiff complained. It was found that the bank of the delph was not in a proper condition, but it was also found, and it was on this that the defendants relied as a defence, that the breaking of the bank had been caused by the water in it having been penned back, owing to the neglect of the commissioners to maintain in a proper state certain works which it was their duty to keep up under their Act. Nevertheless, the defendants were held liable.

These authorities would appear to be sufficient to maintain the plaintiff's right of action under the circumstances of this case. It

must, however, be admitted that in one or two recent cases the Courts have shewn a disposition to confine the liability arising from unlawful acts, negligence, or omissions of duty within narrower limits, by holding a defendant liable for those consequences only which in the ordinary course of things were likely to arise, and which might therefore reasonably be expected to arise, or which it was contemplated by the parties might arise, from such acts, negligence, or omissions. In Greenland *v.* Chaplin, 5 Ex. 243, at p. 248, Pollock, C. B., says: "I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated." Acting on this principle, the Court of Common Pleas, in a recent case of Sharp *v.* Powell, Law Rep. 7 C. P. 253, held that the action would not lie where the injury, though arising from the unlawful act of the defendant, could not have been reasonably expected to follow from it. The defendant had, contrary to the provisions of the Police Act, washed a van in the street, and suffered the water used for the purpose to flow down a gutter towards a sewer at some little distance. The weather being frosty, a grating, through which water flowing down the gutter passed into the sewer, had become frozen over, in consequence of which the water sent down by the defendant, instead of passing into the sewer, spread over the street and became frozen, rendering the street slippery. The plaintiff's horse coming along fell in consequence, and was injured. It was held that as there was nothing to show that the defendant was aware of the obstruction of the grating, and as the stoppage of the water was not the necessary or probable consequence of the defendant's act, he was not responsible for what had happened.

Bovill, C. J., there says: "No doubt, one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom, but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such act, unless it be shewn that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury so as to render the wrongdoer liable to an action." And Grove, J., said: "I am entirely of the same opinion. I think the act of the defendant was not the ordinary or proximate cause of the damage to the plaintiff's horse, or within the ordinary consequences which the defendant may be presumed to have contemplated, or for which he is responsible. The expression, the 'natural'

consequence, which has been used in so many cases, and which I myself have no doubt often used, by no means conveys to the mind an adequate notion of what is meant; 'probable' would perhaps be a better expression. If on the present occasion the water had been allowed to accumulate round the spot where the washing of the van took place, and had there frozen obviously within the sight of the defendant, and the plaintiff's horse had fallen there, I should have been inclined to think that the defendant would have been responsible for the consequences which had resulted." And Mr. Justice Keating said: "The damage did not immediately flow from the wrongful act of the defendant, nor was such a probable or likely result as to make him responsible for it. The natural consequence, if that be a correct expression, of the wrongful act of the defendant would have been that the water would under ordinary circumstances have flowed along the gutter or channel, and so down the grating to the sewer. The stoppage and accumulation of the water was caused by ice or other obstruction at the drain, not shewn to have been known to the defendant, and for which he was in no degree responsible. That being so, it would obviously be unreasonable to trace the damage indirectly back to the defendant."

We acquiesce in the doctrine thus laid down as applicable to the circumstances of the particular case, but we doubt its applicability to the present, which appears to us to come within the principle of Scott *v.* Shepherd and Dixon *v.* Bell, and the other cases to which we have referred. At the same time, it appears to us that the case before us will stand the test thus said to be the true one. For a man who unlawfully places an obstruction across either a public or private way may anticipate the removal of the obstruction, by some one entitled to use the way, as a thing likely to happen; and if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near; thus, if the obstruction be to the carriageway, it will very likely be placed, as was the case here, on the footpath. If the obstruction be a dangerous one, wheresoever placed, it may, as was the case here, become a source of damage, from which, should injury to an innocent party occur, the original author of the mischief should be held responsible. Moreover, we are of opinion that, if a person places a dangerous obstruction in a highway, or in a private road, over which persons have a right of way, he is bound to take all necessary precaution to protect persons exercising their right of way, and that if he neglects to do so he is liable for the consequences. It is unnecessary to consider how the matter would have stood had the plaintiff been a trespasser. The case of Mangan *v.* Atterton, 4 H. & C. 388; Law Rep. 1 Ex. 239, was cited before us as a strong authority in favor of the defendant. The defendant had there exposed in a public market-place a machine for crushing oilcake without its being thrown out of gear, or the handle being fastened, or any person having the care of it. The plaintiff, a boy of four years of

age, returning from school with his brother, a boy of seven, and some other boys, stopped at the machine. One of the boys began to turn the handle; the plaintiff, at the suggestion of his brother, placed his hand on the cogs of the wheels, and the machine being set in motion, three of his fingers were crushed. It was held by the Court of Exchequer that the defendant was not liable, first, because there was no negligence on the part of the defendant, or, if there was negligence, it was too remote; and secondly, because the injury was caused by the act of the boy who turned the handle, and of the plaintiff himself, who was a trespasser. With the latter ground of the decision we have in the present case nothing to do; otherwise we should have to consider whether it should prevail against the cases cited, with which it is obviously in conflict. If the decision as to negligence is in conflict with our judgment in this case, we can only say we do not acquiesce in it. It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion. But be this as it may, the case cannot govern the present. For the decision proceeded expressly on the ground that there had been no default in the defendant; here it cannot be disputed that the act of the defendant was unlawful.

On the whole, we are of opinion, both on principle and authority, that the plaintiff is entitled to our judgment.

Judgment for the plaintiff.[1]

3047LLL

BELLINO v. COLUMBUS CONSTRUCTION CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1905.

[*Reported* 188 *Mass.* 430.]

BARKER, J. The plaintiff procured Italian laborers for the service of the defendant, a corporation engaged in the construction of a public work at Weston. He had erected a temporary building on land of another person near the locality of the work. In a part of this building he kept goods which by an agent he sold to the laborers. The rest of the building was fitted with bunks for sleeping places and was occupied by the laborers for the use of which they paid him. When cold weather came they de-

[1] See also Howe v. Ohmart, 7 Ind. App. 32, 33 N. E. 466. — ED.

manded a fire to heat their quarters, and threatened to quit work unless a stove and fuel were furnished.

One Keefe was the defendant's foreman. He requested the plaintiff's agent to provide a stove to keep the laborers comfortable, and the agent promised that he would write to the plaintiff and when he heard from him would get a stove. Some days later Keefe told the agent that unless the stove was put in he Keefe himself would order it, give it to the men and let them set it up. To this the agent objected and told Keefe that he had no right to put in a stove without the permission of the plaintiff. Finally Keefe procured a stove and had it set up by a carpenter and thereafter furnished the laborers with coal and wood and they constantly kept up a fire, themselves making the fires and helping themselves to the defendant's wood and coal. There was no zinc under the stove and the floor of the building was of wood with wide cracks between the boards.

About one hundred feet away the defendant had a storehouse in which barrels of oil and gasoline were kept but not under lock and key, and to which the laborers had access for the purpose of filling torches which they used to give light by which to work in a tunnel. The laborers who built the fires frequently helped themselves to the gasoline and used it in kindling fires in the stove. Keefe became aware of this and called the attention of the agent to it and told him he must stop it, but did nothing to secure the gasoline, although he notified the employee in charge of the gasoline to prevent the laborers from getting it to use in the stove. The plaintiff's agent knew that the men were lighting the fires with the gasoline but it did not appear that he tried to prevent its use.

Some three weeks after the stove had been set up, as a laborer was kindling the fire, there was an explosion of gasoline; a few drops fell on the floor and a fire ensued which consumed the building and the plaintiff's goods therein.

The case was sent to an auditor who found that the loss caused to the plaintiff by the fire was $1,622.64, but after stating in his report that and other facts, found for the defendant. Thereafter the case was tried by a judge of the Superior Court without a jury. The auditor's report was read. The defendant admitted that the plaintiff himself was in New York, continuously from November 5 to November 18, the fire having occurred on November 22. The plaintiff testified to his whereabouts from November 18 to November 23, and his evidence tended to show that he was not at Weston after the stove was set up and before the fire. The auditor having stated in his report that after the stove was set up Keefe had an interview with the plaintiff at which he informed the plaintiff that repeated efforts had been made to get a stove for the men and had stated to him what action he had taken in the matter the plaintiff said "it was all right" and having also reported that the plaintiff must have known that the stove had been set up and must have seen it, the plaintiff further testified that he never had any conversation with Keefe about the

stove. This with the auditor's report was all the material evidence at the trial. The presiding judge found for the defendant and reported the case for the determination of this court.

It is plain that from the auditor's report as evidence, notwithstanding the defendant's admission at the trial that the plaintiff was in New York from the fifth to the eighteenth of November and the plaintiff's testimony that he never had any conversation with Keefe about the stove, the judge may have found that the plaintiff knew that the stove had been put in and had assented that Keefe's actions in the matter were satisfactory to him. This of itself would seem to be enough to require us to order judgment to be entered for the defendant on the finding in its favor.

But assuming that Keefe's act in putting in the stove was an uncondoned trespass a majority of the court are of opinion that the plaintiff cannot recover. The putting in of the stove for the use of the laborers did not of itself cause the destruction by fire of the plaintiff's building and goods. The possibility that the laborers in using the stove might negligently set the building on fire was too remote a contingency to render the defendant liable for it as a natural consequence of the trespass. See Hawks *v.* Locke, 139 Mass. 205, 208, and cases cited.

Nor would the facts that the defendant kept gasoline in barrels in a storehouse one hundred feet away and not under lock and key, and that the laborers without right helped themselves to the gasoline and by negligently using it burned the building and goods, make the defendant responsible. A wrongful act of the laborers against which Keefe had provided by his warning to the plaintiff's agent, as well as by his orders to the defendant's employee in charge of the storehouse, and the subsequent negligence of the laborers themselves in using the misappropriated gasoline both intervened between the keeping of the gasoline in an unlocked storehouse and the loss to the plaintiff. It was not under all the circumstances imperative upon the judge to find that it was negligence on the part of the defendant to keep gasoline in an unlocked storehouse. Nor, if he found that so to keep it was wanting in due care, was it imperative upon him to find that according to the usual experience of mankind the taking of the gasoline and its negligent use by the laborers ought to have been anticipated as probable. Stone *v.* Boston & Albany Railroad, 171 Mass. 536; Glassey *v.* Worcester Consolidated Street Railway, 185 Mass. 315.

It is not contended that the laborers when kindling the fire were acting within the scope of their employment as servants of the defendant.

Judgment for the defendant on the finding.[1]

[1] See also Cuff *v.* Newark R. R., 35 N. J. L. 17. — ED.

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HARRISON v. BERKELEY.

COURT OF APPEALS, SOUTH CAROLINA, 1847.

[*Reported* 1 *Strob. Law*, 525.]

The following is the report of the presiding judge:

This was an action of trespass on the case, in which the plaintiff sought to recover damages, for that the defendant, being a shop-keeper, in violation of the statute on the subject, and to the wrong of the plaintiff, sold and delivered ardent spirits to Bob, a slave of the plaintiff, by means whereof the said slave became intoxicated, and died.

It appeared that on the 24th day of December, 1845, Bob, being patroon of one of the plaintiff's boats, on his way from Charleston, went into the shop of defendant in Camden, and there received a gallon jug and a quart bottle of whiskey, and started with them in the afternoon, to convey to his master in Fairfield, across the Wateree, intelligence of the boat's arrival. Bob drank none at the shop, but drank repeatedly from the bottle before he reached the river, at the ferry, and afterwards; fell down in the road repeatedly; fell into a creek, in which he would have been drowned, but for the aid of some white men then in his company; and soon afterwards, at the fork of the roads, proceeded alone, staggering. He was clad in homespun, and had a bundle, besides the jug, on his back. The night was misty and somewhat cold. He called at a house and got fire, returned and went again. Next morning he was found dead near the house where he had called; the jug of whiskey full and corked near him, the bottle not to be seen; and upon movement of his body, a fluid smelling like whiskey flowed from his mouth. A physician examined his body upon the inquest, but could discover no external injury; and from the want of rigidity in the muscles and other appearances, had no doubt that he died of drunkenness and exposure.

WARDLAW, J. delivered the opinion of the court.

This action is novel in the instance, but that is no objection to it, if it be not new in principle. The law endures no injury, from which damage has ensued, without some remedy; but directs the application of principles already established, to every new combination of circumstances that may be presented for decision.

It has, however, been urged here again, as it was on the circuit, that admitting everything which the plaintiff has alleged, he has presented either a case of damage without legal injury, or a case of injury without legal damage.

First. Damage without injury. It is said, that the act of selling or giving whiskey to the slave, Bob, was not in itself a wrong to the plain-

tiff, but was only a violation of a penal statute, which has imposed upon such acts penalties, to be recovered by indictment; and that, therefore, no action by the plaintiff lies, nor any remedy but the indictment prescribed by the statute.

The wrong, for which an action of trespass on the case lies, may be either an unlawful act, or a lawful act done under circumstances which render it wrongful — any act done or omitted, contrary to the general obligation of the law, or the particular rights and duties of the parties. It might not be difficult to distinguish between the selling, or giving of spirituous liquor to a slave, and the fair selling to a slave of an article which could not be expected to produce harm; and to show that, independent of any express statutory prohibition, the former act is so contrary to the rights of the master, and to the duties imposed upon other persons in a slave-holding community, that the person who does it without special matter of excuse, subjects himself to liability for all the legal damage that may thence ensue, in like manner as if he had carelessly or wantonly placed noxious food within the reach of domestic animals. But this case may be rested where the plaintiff left it. Our statutes, time after time, have subjected him, who sells to a slave any article without license, to fine and imprisonment upon his conviction after indictment; and the last statute on the subject provides especially for the punishment, upon conviction after indictment, of him, who sells or gives spirituous liquor to a slave. No express prohibition is contained in either of the statutes, but the penalties necessarily imply a prohibition, and make the thing prohibited, unlawful; (10 Co. 75). For the injury to the public, the only remedy is that provided by the statute — indictment; but as in case of a nuisance to the whole community, if any person has suffered a particular damage beyond that suffered by the public, he may maintain an action in respect thereof, (2 Ld. Ray. 985); so in case of a misdemeanor punishable by statute, a party grieved is entitled to his action for the particular damage done to him by reason of the unlawful act.

Second. We come then to the main ground assumed in the defence — that no legal damage followed the injury, but that which was shown was too remote — not such a consequence of the injury as the law will notice.

It would be vain to attempt to define with precision, the terms which have been used on this subject, or to lay down any general rules, by which consequences that shall be answered for, and those which are too remote for consideration, may be always distinguished. But we will endeavor, without dwelling on particular cases, to deduce from the general course of decision on this point, so much as may show that the instructions given were sufficiently favorable for the defendant, and that verdict is conformable to law.

We are troubled here with no distinctions between loss sustained and gain prevented; nor with any between cases which have been aggra-

vated by evil motive, and those which have not been: for the plaintiff here has claimed only compensation for his actual loss; and the defendant may be regarded as the jury were instructed to regard him — that is, as one who, with no particular evil purpose or ill-will towards master or slave, has violated the law only for his own gain.

A distinction, however, is to be observed between cases where the damage ensues, whilst the injurious act is continued in operation and force, and those where the damage follows, after the act has ceased. In the former class, were the cases of Wright & Gray, (2 Bay, 464) and all the cases which have been cited, or supposed, of slaves put without permission of the owners on race-horses, in steam-boats, or on railroads — those of property injured during a deviation from the course which was prescribed concerning it, (6 Bing. 716) and in general all, where unexpected damage was done, whilst an unauthorized interference with another's rights lasted. Here it is usually of small moment to inquire, whether the damage was the natural consequence of the injury, because the immediate connexion between the wrongful act, and the damage sustained, shows that the damage, however extraordinary, has actually resulted directly from the injury. But in the latter class, to which the case before us must be assigned, the connexion is not immediate between the injury and the consequences; and it becomes indispensable to discriminate in some way between the various consequences that in some sense may be said to proceed from the act, for all of them cannot constitute legal damage.

Every incident will, when carefully examined, be found to be the result of combined causes, and to be itself one of various causes which produce other events. Accident or design may disturb the ordinary action of causes, and produce unlooked for results. It is easy to imagine some act of trivial misconduct or slight negligence, which shall do no direct harm, but set in motion some second agent that shall move a third, and so on, until the most disastrous consequences shall ensue. The first wrongdoer, unfortunate rather than seriously blameable, cannot be made answerable for all of these consequences. He shall not answer for those which the party grieved has contributed by his own blameable negligence or wrong to produce, or for any which such party, by proper diligence, might have prevented. (Com. Dig. action on the case, 134; 11 East. 60; 2 Taunt. 314; 7 Pick. 284.) But this is a very insufficient restriction; outside of it would often be found a long chain of consequence upon consequence. Only the proximate consequence shall be answered for. (2 Greenleaf Ev. 210, and cases there cited.) The difficulty is to determine what shall come within this designation. The next consequence only is not meant, whether we intend thereby the direct and immediate result of the injurious act, or the first consequence of that result. What either of these would be pronounced to be, would often depend upon the power of the microscope, with which we should regard the affair. Various cases shew that in search of the proximate consequences

the chain has been followed for a considerable distance, but not without limit, or to a remote point. (8 Taunt. 535; Peak's cases, 205.) Such nearness in the order of events, and closeness in the relation of cause and effect, must subsist, that the influence of the injurious act may predominate over that of other causes, and shall concur to produce the consequence, or may be traced in those causes. To a sound judgment must be left each particular case. The connexion is usually enfeebled, and the influence of the injurious act controlled, where the wrongful act of a third person intervenes, and where any new agent, introduced by accident or design, becomes more powerful in producing the consequence than the first injurious act. (8 East, 1; 1 Esp. 48.) It is, therefore, required that the consequences to be answered for, should be natural as well as proximate. (7 Bing. 211; 5 B. & Ad. 645.) By this, I understand, not that they should be such as upon a calculation of chances would be found likely to occur, nor such as extreme prudence might anticipate, but only that they should be such as have actually ensued one from another, without the occurrence of any such extraordinary conjuncture of circumstances, or the intervention of any such extraordinary result, as that the usual course of nature should seem to have been departed from. In requiring concurring consequences, that they should be proximate and natural to constitute legal damage, it seems that in proportion as one quality is strong, may the other be dispensed with: that which is immediate, cannot be considered unnatural; that which is reasonably to be expected will be regarded, although it may be considerably removed. (20 Wend. 223.)

It has been supposed, in argument, that without any of these distinctions, it is always sufficient to inquire only whether the consequences have certainly proceeded from the injurious act: but it will be seen, that in settling what have certainly proceeded from the act, we will be obliged to determine what are natural and proximate, unless we mean to run to absurd extremes.

In the case before us, the defendant has insisted that the damage resulted not so much from his act as from the acts of the slave, who was a moral being, and a free agent. (4 M'Cord, 223.) In cases where damage has been done, during the continuance of a wrongful interference with a slave, it was considered of no consequence that the slave was a free agent: (2 Rich. 613; Id. 455; 9 La. Rep. 213) for there the consent of the slave could not justify the interference, and even the wilful act of the slave producing the damage was like any other improbable misfortune which might have occurred whilst the wrongful act was in operation. But in cases like this, the will of a slave may well interrupt the natural consequences of a wrongdoer's act, and produce consequences for which he should not answer. Selling whiskey to a slave is no more unlawful than selling to a slave any other article without license. And if a rope, sold to a slave, without license and without suspicion of mischief, should be employed by the slave to hang himself, the prominent ground of dis-

tinction between that case and the present one would depend upon the will of the slave. If it should be said that the slave would have got a rope elsewhere, or would have taken some other means of self-destruction, it might be answered that if this defendant had not sold the whiskey, Bob would have got it, or some other means of intoxication, elsewhere. But where the mischievous purpose of a slave is manifest, or should be foreseen by ordinary prudence, the injurious act embraces the will of the slave as one of its ingredients; — the wrong consists, in part, in ministering to the purpose, and natural consequences of that purpose, (although the purpose may have been carried to an extent not anticipated, or the consequences may have been altogether undesigned and unusual,) are the legal consequences of the injurious act. Therefore, it was well left to the jury, to decide whether the drinking and intoxication of Bob were the natural and probable consequences of selling liquor to him. If fault be found with the instructions given on this head, it is that they were too favorable to the defendant, in requiring that the consequences should be found to be probable as well as natural. For proximate and natural consequences, not controlled by the unforeseen agency of a moral being, capable of discretion, and left free to choose, or by some unconnected cause of greater influence, a wrong-doer must generally answer, however small was the probability of their occurrence. In many instances, the will of a slave, as a controlling cause, would be found as feeble as was the will of a child that received damage from a cart left carelessly in the street, which he unlawfully attempted to drive. (1 Adol. & El. N. S. 28.) Often the intervention of a third person's will, influenced by the injurious act, has no effect in rendering consequences too remote. (1 Ad. & El. 43; 2 C. Mer. & Rosc. 707.)

The defendant, however, has further insisted that if the drinking and intoxication were the proximate and natural consequences of his act, the exposure and death were not: but that the death resulted mainly from the exposure, and not from the intoxication only. It may well be said, (speaking in the language of everyday life, which attempts no philosophical analysis,) that the exposure was the immediate effect of the intoxication, and that the two produced the death. Thus, without any unconnected influence to be perceived, the death has come from the intoxication, which the defendant's act occasioned. The defendant cannot complain that an agent, which his own act naturally brought into operation, has occurred to produce the result. The proximity in order of events, and intimacy of relation as cause and effect, between the injurious act and the damage are as great here as in various cases which have been cited. (17 Pick. 78; 3 Scott New R. 386; 17 Wend. 71; 9 Wend. 325; 11 East, 571; and the cases before cited.)

The jury have decided the facts, and this court is of opinion that under the inferences which must be drawn from the finding, the verdict is free from the objection that the damages were too remote.

The instructions concerning a delivery to Bass, as an instrument of Bob, are approved.

The motion is dismissed.

WITHERS, J., having been of counsel in this cause, gave no opinion.

FOTTLER v. MOSELEY. 302742

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1904.

[*Reported* 179 *Mass.* 295.]

TORT for deceit, alleging that, relying upon the false and fraudulent representations of the defendant, a broker, that certain sales of the stock of the Franklin Park Land Improvement Company, in the Boston Stock Exchange from January 1 to March 27, 1893, were genuine transactions, the plaintiff revoked an order for the sale of certain shares of that stock held for him by the defendant, whereby the plaintiff suffered loss. Writ dated February 17, 1896.

At the first trial of the case in the Superior Court a verdict was ordered for the defendant, and the exceptions of the plaintiff were sustained by this court in a decision reported in 179 Mass. 295. At the new trial in the Superior Court before Sherman, J., it appeared that one Moody Merrill, a director and officer of the Franklin Park Land Improvement Company absconded late in May or early in June of 1893, and that immediately upon his departure it was discovered that he had embezzled nearly $100,000 of the funds of that company, the result of which was that the market price of the stock immediately fell and the stock could not be sold; that the plaintiff from the time of the discovery of the defendant's alleged fraud did his best to sell his stock, but was unable to do so at more than $3 a share, at which price he sold it after bringing this action.

The plaintiff among other requests asked the judge to rule, "That it is of no consequence so far as the defendant's liability is concerned that an outside intervening cause has been the sole or contributing cause of the decline in price to which the plaintiff's loss is due."

The judge refused this and other rulings requested by the plaintiff, and instructed the jury, among other things, as follows:

"If you find the fair market value of that stock was always above what it was fictitiously quoted, or equal to it, and that it was so on the 25th of March, 1893, and remained so and would have remained so, except for the embezzlement and absconding of Moody Merrill, then the plaintiff is not entitled to recover.

"If you find that Moody Merrill's going away did destroy the value

of the stock, practically destroy its value, then the plaintiff is not entitled to recover anything.

"You may take all the evidence on this subject, the fact of what Moody Merrill did, and what effect it had upon the market value of this stock, and if that destroyed the market value, then, as I have told you, the plaintiff is not entitled to recover anything. If his going away and embezzlement did not affect the market value of this stock, then the plaintiff may recover the full value of it."

The judge submitted to the jury the following questions, which the jury answered as stated below:

"1. Did the defendant make a representation to the plaintiff on or about March 25, 1893, that the quotations in the Boston Stock Exchange of Franklin Park Land and Improvement Company stock were quotations of actual and true sales?" The jury answered "Yes."

"2. Were such quotations at or about the same sum as the quotations of actual sales and the sales at public auction?" The jury answered "Yes."

"3. What was the fair market value of said stock on or about March 25, 1893?" The jury answered "$28.50 per share."

"4. What was the fair market value of said stock on the last day of May, or immediately prior to June, 1893, the day before Moody Merrill's absconding?" The jury answered "$27.75 per share."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

KNOWLTON, C. J. The parties and the court seem to have assumed that the evidence was such as to warrant a verdict for the plaintiff under the law stated at the previous decision in this case, reported in 179 Mass. 295, if the diminution in the selling price of the stock came from common causes. The defendant's contention is that the embezzlement of an officer of a corporation, being an unlawful act of a third person, should be treated as a new and independent cause of the loss, not contemplated by the defendant, for which he is not liable.

To create a liability, it never is necessary that a wrongdoer should contemplate the particulars of the injury from his wrongful act, nor the precise way in which the damages will be inflicted. He need not even expect that damage will result at all, if he does that which is unlawful and which involves a risk of injury. An embezzler is criminally liable, notwithstanding that he expects to return the money appropriated after having used it. If the defendant fraudulently induced the plaintiff to refrain from selling his stock when he was about to sell it, he did him a wrong, and a natural consequence of the wrong for which he was liable was the possibility of loss from diminution in the value of the stock, from any one of numerous causes. Most, if not all, of the causes which would be likely to affect the value of the stock, would be acts of third persons, or at least conditions for which neither the plaintiff nor the defendant would be primarily responsible. Acts of the

officers, honest or dishonest, in the management of the corporation, would be among the most common causes of a change in value. The defendant, if he fraudulently induced the plaintiff to keep his stock, took the risk of all such changes. The loss to the plaintiff from the fraud is as direct and proximate, if he was induced to hold his stock until an embezzlement was discovered, as if the value had been diminished by a fire which destroyed a large part of the property of the corporation, or by the unexpected bankruptcy of a debtor who owed the corporation a large sum. Neither the plaintiff nor the defendant would be presumed to have contemplated all the particulars of the risk of diminution in value for which the defendant made himself liable by his fraudulent representations. It would be unjust to the plaintiff in such a case, and impracticable, to enter upon an inquiry as to the cause of the fall in value, if the plaintiff suffered from the fall wholly by reason of the defendant's fraud. The risk of a fall, from whatever cause, is presumed to have been contemplated by the defendant when he falsely and fraudulently induced the plaintiff to retain his stock.

We do not intimate that these circumstances, as well as others, may not properly be considered in determining whether the plaintiff was acting under the inducement of the fraudulent representations in continuing to hold the stock up to the time of the discovery of the embezzlement. The false representations may or may not have ceased to operate as an inducement as to the disposition of his stock before that time. Of course there can be no recovery, except for the direct results of the fraud. But if the case is so far established that the plaintiff, immediately upon the discovery of the embezzlement, was entitled to recover on the ground that he was then holding the stock in reliance upon the fraudulent statements, and if the great diminution in value came while he was so holding it, the fact that this diminution was brought about by the embezzlement of an officer leaves the plaintiff's right no less than if it had come from an ordinary loss.

Exceptions sustained.

MARS *v.* DELAWARE & HUDSON CANAL CO.

SUPREME COURT OF NEW YORK, 1889.

[*Reported* 54 *Hun*, 625.]

PUTNAM, J. Plaintiff, while lawfully on a regular passenger train of defendant, on May 20, 1884, was injured by its collision with a "wild-cat" engine. The wild-cat engine was left that evening about 7 o'clock standing upon a side track, two tracks east of the down main track,

upon which the collision occurred, with its fire banked, in charge of an employee (one McFarland) whose duty it was to keep water in the boiler and take general charge of it over night. About one A. M., McFarland left the engine standing upon said side track and went north several hundred feet to a switch shanty. While there the engine was moved in some way across several switches upon the south-bound main track, and the engine started north, backward, without lights and with no person upon it, at full speed. It ran about half a mile and collided with the train in question.

The action is founded on the defendant's alleged negligence in leaving its engine unattended on a side track, and it is claimed that such negligence caused the injury to plaintiff for which the action is brought. It is not clear that the act of defendant in leaving its engine on its own premises, with its fire banked and where it could not go on to any main track without passing several switches, with a competent man in charge of it, and who appears only to have left it after it had stood six hours, and when not likely to start, was under any circumstances a negligent act. A party is only answerable, as for negligence, for omitting to provide against those dangers which might be reasonably expected to occur, such as might be foreseen by ordinary forecast. (Carpenter Case, 24 Hun, 108.) Could defendant, by ordinary forecast, have foreseen that this engine would be moved over two or three switches, across an intervening track, onto the south-bound track and sent flying northward? We, however, in our consideration of the case, assume that the jury were authorized to find that the act of defendant and its servants, in leaving this engine on the track unattended at the time mentioned, was negligence, and hence that if that negligent act was the cause, or proximate cause, of the injury to the plaintiff, the verdict given by the jury should be sustained.

The learned judge who presided at the trial charged that, if the engine was started from where it was placed by the employees of the defendant the night before, by some person not in the employ of defendant, and taken to the main track and sent northward, thus causing the accident, the defendant was not liable; but that if such act was done by one of defendant's employees, though negligently or willfully, defendant would be liable. And he refused to charge that if the act was done maliciously by one of the defendant's employees (except McFarland), defendant was not liable.

The evidence in the case was such that the jury could have properly found that the engine was taken from where it had been left, southward, over and across several switches, onto the south-bound track and sent rapidly northward. The freight agent saw it first going north on the main track by the freight depot, which was south of where it stood, during the night. Another witness saw it laboring hard and coming from the south. We are not aware that there is any contradiction of this testimony, and hence it may, perhaps, be deemed

established that the engine was taken south to the main track and then turned and sent northward. But, at least, there was such evidence given that the jury could have properly so found. The probabilities are that the engine, which had stood there six hours safely, would not *then* have started itself, and moving over several switches, onto the main track, have gone northward. If the engine went south to the main track and then turned north, it follows that the engine must have been so moved by some human agency. It did not appear, nor was there any evidence to indicate, whether the act was done by an employee of defendant or other person. The act, by whomever done, was a wicked, malicious and criminal act, subjecting the offender to criminal punishment. The engine was put in charge of McFarland, and it is conceded that he did not set it in motion. Whoever did put the engine on the south-bound track and start it north, whether an employee or not, did an act in violation of the rules of the company, without authority (because McFarland only had, at that time, authority over the engine), and if an employee not in the discharge of, or in the line of, his duty as employee, but outside of it.

The general rule is well settled that if a servant misconducts himself in the course of his employment, his acts are the acts of his master, who must answer for them, even if the acts are willful and malicious. But if a servant goes outside of his employment and without regard to his service, acting with malice or in order to effect some purpose of his own, wantonly causes damage to another the master is not liable. (Mott *v.* Consumers' Ice Co., 73 N. Y., 547, 548; Rounds *v.* Del. Lack. and W. R. R. Co., 64 id. 136; Isaacs *v.* Third Ave. R. R. Co., 47 id. 122.) If an employee of defendant moved the engine, he was not acting for defendant; he was not doing an act within his employment, or that he had a right to do, but he was committing a most heinous crime. As to that the relation of master and servant did not exist between defendant and him. Hence we think that, assuming the engine was moved by some person from where it was placed by defendant, such act was a theft of the engine, a criminal act, and, whether done by an employee of defendant or other person, the defendant is not responsible therefor. The person committing such a crime did not, in doing it, act as the agent of defendant. If the injury sued for was caused by said act, the defendant is not liable therefor.

We think, therefore, that as it appeared, or the jury were authorized to find, that the engine was moved south to the main track, and then north, by some employee of defendant or other person maliciously, the defendant was entitled to have the jury instructed that if the engine was maliciously started by one of defendant's employees, other than McFarland, the defendant was not liable. Also, that the exception to the charge of the judge to the jury, that if the person who committed the act was an employee of the company, whether

the act was done carelessly or willfully, the defendant was not relieved of liability, was well taken, and hence that there should be a new trial unless the position taken by plaintiff, and next considered, is correct.

The plaintiff contends that, conceding the engine was moved maliciously by an employee of the defendant or other person, yet the negligent act of the defendant in leaving where it was, a dangerous machine with fire in it, and without an attendant, was one of the concurring or proximate causes of the injury to the plaintiff, and hence that plaintiff was entitled to recover.

In Williams *v.* Delaware Lackawanna and Western Railroad Company (39 Hun, 434) it is stated that "to entitle the plaintiff to recover upon the ground that defendant was guilty of negligence, in not furnishing a sufficient number of brakemen, it was incumbent on the plaintiff to show that his injury was the result of such negligence; that it was the natural and probable consequence of the defendant's omission, and that the accident would not have happened but for such omission." Wharton says: "Supposing that if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff. Is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action." (Wharton's Law of Negligence, § 134.) The negligent act which is the proximate cause of the injury is an act which naturally and probably would produce it. (Kerrigan *v.* Hart, 40 Hun, 390, 391; Williams Case, *supra*; Ryan *v.* N. Y. C. R. R. Co., 35 N. Y. 210; Lowery *v.* Manhattan Ry. Co., 99 id. 158; Pollett *v.* Long, 56 id. 200; Hofnagle *v.* N. Y. C. and H. R. R. R. Co., 55 id. 608.) That is, where the negligent act is the cause of the injury and where there is no intervening agency affecting or changing the operation of the primal cause. (Reiper *v.* Nichols, 31 Hun, 495.)

The injury to plaintiff, for which this action is brought, was not caused by the neglect of the defendant in leaving its car on the track. The injury was not the natural or ordinary result of such an act. It could not have been foreseen. Between the alleged negligence of defendant and the accident intervened a willful, malicious and criminal act of a third person, which caused the injury and broke the connection between defendant's negligence and the accident. In fact, some person stole defendant's engine and sent it flying up the track, and this wicked criminal act was the cause of the injury to the plaintiff, and defendant's act in leaving the engine where the criminal could start it was in no sense the proximate cause of the injury, or an act which ordinarily or naturally could have produced it.

Plaintiff has called our attention to a large number of cases bearing on the question discussed. We have examined those cases and do not think that any of them are quite parallel to this case. None

of them held that where, between the negligent act and the injury, there intervened a willful, malicious and criminal act, which was the immediate cause of the injury, and where the injury was not the ordinary or probable result of the negligence complained of, and could not have been foreseen, that such negligence is the proximate cause of the injury.

In the cases cited by plaintiff it will be found that the injury was the natural, probable or direct result of the negligent act. In the Cohen Case (113 N. Y. 532) the injury was the direct result of the wrongful act of the city of New York, in allowing a person to keep a nuisance in the street. In Lane *v.* Atlantic Works (111 Mass. 136) the court put the decision on the ground "that the original negligence still remains a culpable and direct cause of the injury. *The test is to be found in the probable injurious consequences which were to be anticipated.*" In Illidge *v.* Goodwin (5 Carr. & P. 190) a horse and cart were left in the street without an attendant. A wrongdoer struck the horse, started him, and he did the injury complained of. But a horse standing in the street is liable to run away. It may become restless or frightened, or be started by a wrongdoer. The injury in that case was the natural and ordinary consequence of the neglect shown and should have been foreseen. That case is very briefly reported. It does not appear whether the striking of the horse was merely a negligent striking or a willful act. If in that case some one had taken the reins and driven the cart into another street, and started the horse on a run against another wagon on that street, the case would have been more like this.

The case before us (assuming that some person maliciously started the engine) might be deemed like that of a man who negligently left a loaded gun on his premises, accessible to the public, which some one took and with it injured another. Would the owner of the gun be liable for the injury? In Binford *v.* Johnston (82 Ind. 428) it was held that the fact that some agency intervened between the original negligence and the injury, did not preclude a recovery if the injury was the natural and probable result of the original wrong. In the Lowery Case (99 N. Y. 163) it was held, although the act of the driver intervened between the negligence of the defendant and the injury, that the act of the driver, in view of the exigencies of the case, whether prudent or otherwise, may well be considered as a continuation of the original act which was caused by the neglect of defendant. In the "Squib" case the intermediate parties were held to have acted mechanically in a sudden, convulsive act, so that the injury was in fact deemed caused by the original negligent act of the defendant. So we think that all the cases cited by the plaintiff will be found to differ from the case we are considering in the regard above suggested.

We think there should be a new trial. If such a state of facts appear on the retrial that the jury would be authorized to find that the engine

started itself, without being set in motion by any human agency, found its way on to the main track and thus caused the accident, we think the case would properly be submitted to the jury. Should it appear, however, that some wrongdoer criminally placed the engine on the south-bound track and started it northward, we are of the opinion that the defendant could not be held liable. In that case defendant could not be deemed negligent as to the plaintiff.

The judgment should be reversed and a new trial granted, costs to abide the event.

LEARNED, P. J., concurred.

LANDON, J. (dissenting): The case of Lane *v.* Atlantic Works (111 Mass. 136), states very clearly the propositions governing this case. The injury must be the direct result of the misconduct charged, but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. Practical knowledge and experience are required for the determination of the question whether some such injurious interference and result ought to have been apprehended, and the verdict of the jury usually determines this question. Here the jury have answered the questions involved as follows: When the engine was abandoned it was reasonable to apprehend that some weak or wicked person would be tempted to set it in motion. A jury of railroad superintendents would probably concur in that conclusion. If thus set in motion, injury was to be apprehended to whatever persons or property might then happen to be exposed. The plaintiff was exposed and, therefore, injured.

I advise an affirmance of the judgment.

Judgment reversed, new trial granted, costs to abide event.[1]

MILOSTAN *v.* CHICAGO.

APPELLATE COURT, ILLINOIS, 1909.

[*Reported* 148 *Ill. App.* 540.]

IT appears from the evidence that there is a brick building, fronting on Noble Street, at the southwest corner of Noble and Blackhawk streets. The building stands up close to the sidewalk on Blackhawk street. On the latter street, along the side of the building, there is an opening or area-way in the cement sidewalk. This area-way is variously stated to be three to six feet wide, about six feet in depth and of con-

[1] See International R. R. *v.* Johnson, 23 Tex. Civ. App. 160. — ED.

siderable length. About 5 o'clock in the afternoon in question, Jozef Milostan, with two friends, Bernard Piotrowski and John Magorski, came, walking east, along the sidewalk at the side of this building. Bernard walked to the left of plaintiff and John a little behind the two. When they were within a few feet of Noble street Bernard suddenly stepped behind Jozef, grabbed him by the two arms and pushed or shoved him off the sidewalk into the area-way. Bernard testified that he did it intentionally, to scare Jozef — "fool" him or have some fun with him, but that he did not intend to hurt him. Jozef suffered a compound fracture of the bone extending from the shoulder to the elbow-joint in the left arm, and there was both a transverse and a longitudinal fracture. It is probably a permanent injury. There is no question, upon the evidence, but that the act of Bernard was a wilful, intentional act. The act was neither an act of negligence nor an accident.

CHYTRAUS, J. Plaintiff can recover only if he succeeds in establishing one of two propositions, namely: The negligence of the city, in leaving unguarded the area-way, was the proximate cause of the plaintiff's injury; or, the combined and concurring negligence of Bernard Piotrowski and the city was the proximate cause of the plaintiff's injury. If the act of Piotrowski was the proximate cause, then the plaintiff cannot recover. No matter how negligent the city was, if its negligence was not the proximate cause, or one of the elements in the proximate cause, the city is not liable. There is, in this case, no material fact in dispute. "It is a general principle of jurisprudence, under both the civil and common law, that, to entitle a party to recover for damages alleged to have been sustained in consequence of the negligence of another, there must not only be negligence in fact, but it must have been the proximate cause of the injury." C. & A. R. R. Co. *v.* Becker, 76 Ill. 25, 30.

At the start, it is well to have a clear understanding of the meaning of the term proximate cause. The Century Dictionary defines "proximate" to mean "next," "immediate," "without the intervention of the third," and "proximate cause" as "that cause which immediately precedes and directly produces an effect, as distinguished from a remote, mediate or predisposing cause." In Wabash R. R. Co. *v.* Coker, 81 Ill. App. 660, which was affirmed in the Supreme Court, after holding that "The breach of duty upon which an action is brought must not only be the cause, but the proximate cause, of the damages to the plaintiff," the court defined proximate cause by saying: "The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new, independent cause, produced an event, and without which that event would not have occurred." In Strojny *v.* Griffin Wheel Co., 116 Ill. App. 550, 552, this court adopted that definition and added: "An intervening sufficient cause is a new and independent force which breaks the

causal connection between the original wrong and the injury, and it becomes the direct and immediate — that is, the proximate — cause of the injury. The test is, was it a new and independent force, acting in and of itself in causing the injury, and superseding the original wrong so as to make it remote in the chain of causation?" In Goodlander Mill Co. *v.* Standard Oil Co., 11 C. C. A. 253, 63 Fed. 400, a case in which there was a bitter legal contest between able counsel, we find the definition stated as follows: "The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. . . . The remote cause is that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof."

When we understand what is meant by "proximate cause," it is clear, without discussion, that the omission of the city, in leaving unguarded the area-way, was not alone the proximate cause of the plaintiff's injury, if it was a cause at all. Thus the plaintiff fails in the first of the two propositions stated.

It is to be noted, in connection with the second proposition, that the plaintiff's position is, in his brief, stated as follows: "We contend that the negligence of the defendant contributed to the injury and that without the negligence of the defendant in this regard the accident could not have occurred." It is true that where an "injury is the result of the negligence of the defendant and that of a third person; or of the defendant and an inevitable accident; or an inanimate thing has contributed with the negligence of the defendant to cause the injury, the plaintiff may recover, if the negligence of the defendant was an efficient cause of the injury." Pullman Palace Car Co. *v.* Laack, 143 Ill. 242, 261. If an act of negligence on the part of Piotrowski and an act of negligence on the part of the city combined or coöperated — the two concerning proximately, that is, not necessarily in point of time but in causation, to the effect — so as to injure the plaintiff, then, unquestionably, both would be liable to him, jointly or severally. It would, however, in such case, be necessary in order to create liability upon both that negligence on the part of both should contribute proximately, that is, as an element in the proximate cause, and without intervention of another independent force as the producing cause. In the case at bar it is to be observed that the concurring act of Piotrowski was not merely an act of negligence but it was an intentional, wilful and deliberate act. That is to say, the act was wilful whether or not the intent to injure was present. On the other hand, on the part of the city there was merely the passive, omissive negligence of permitting, or leaving in an unguarded state, the area-way, without which negligence, it is contended, "the accident could not have occurred." Passing, for a moment, the question whether anything in the evidence justifies the assertion that but for the unguarded state of the

area-way this accident could not have occurred we find, here, that the act of Piotrowski and the omission of the city are not of the same legal nature and not on the same legal level in the law of wrongs to persons. This raises a question entirely different from that which would have arisen, if Piotrowski's act had been one of negligence merely. Undoubtedly the city was guilty of negligence in permitting the area-way to exist in the sidewalk, and more so in permitting it to remain unguarded. But an act of wilful violence by one person and mere negligence chargeable to another person cannot, together, contribute so as to become the proximate cause of injury to a third person. For instance, as here, a wilful act of violence of the one and a negligent physical condition chargeable to another are incompatible as joint and contributory elements in one and the same proximate cause of an injury. In the very nature of things, wilful violence, as a producing or efficient cause of injury, will precede negligence, where they, in point of time, concur or co-exist in connection with the injury. Whatever the breach of duty constituting merely negligence, on the part of one, the interposition, by another, of wilful violence, is, necessarily, an intervention of a new and independent force, which breaks the causal connection between the negligence and the injury. The inconsistency and incompatibility between wilful violence and mere negligence is such that they cannot concur or co-exist, in the direct or proximate cause, except in point of time; the idea that they can juridically be co-ordinates in the causation of an injury is inconceivable. Concurrence in point of time is not, necessarily, concurrence in point of cause. While the two — negligence and violence — may concur in point of time, the violence necessarily precedes the negligence in being the producing, direct and proximate cause of the injury. At common law there is a distinct remedy for each; in the one instance trespass and in the other an action on the case lies. Conceding, therefore, that the negligence of the city concurred, in point of time, with the act of Piotrowski, which was an act of wilful violence, and the injury to plaintiff was thus effected, then the wilful violence of Piotrowski was the proximate cause and the mere negligence on the part of the city was but a remote cause of the injury to the plaintiff. In no wise can we consider the act of Piotrowski as negligence, merely.

But, considering the case from another point of view, we cannot agree with plaintiff's counsel that the negligence of the defendant was the proximate cause of the injury. True, at the place in question, there was a state or condition of negligence created by defendant's failure to exercise reasonable care to keep the sidewalk — highway — reasonably safe for ordinary use. But, in this particular instance, the plaintiff, so far as that particular negligence is concerned, was passing along — by the area-way — in safety and he had, undoubtedly, the hour of the day being considered, observed the area-way and was avoiding it. He had passed alongside of the area-way for a considerable

distance and was nearly past it when Piotrowski's act, availing itself of the existing conditions and the occasion afforded by the presence of the area-way, intervened, and, as the direct and efficient cause, brought about plaintiff's injury. Plainly plaintiff would have safely passed the area-way but for the intervention of this procuring and proximate cause of the injury. The remark made by Dr. Bishop in one of his excellent works, while discussing contributory negligence on the part of a plaintiff, is here, in principle, applicable. He says: "If, while one is negligent — perhaps the expression should be, in a state of negligence — another negligently employs an independent force, which, availing itself of the occasion afforded by the former's negligence, works a harm not its natural and probable consequence, but an independent harm, the first negligence is not contributory to the second." Bishop Non-Contract Law, § 463. According to the facts in this particular instance it is clear that the harm done plaintiff was not a natural consequence of the presence of the area-way and therefore the condition of the area-way was not, in point of causation, the direct or proximate cause of plaintiff's injury.

Plaintiff's counsel appear to argue that the presence of the area-way operated as an incentive or inducement to Piotrowski, by his wilful violence, to shove plaintiff into this area-way. For, it is argued "that without the negligence of the defendant in this regard the accident would not have occurred." Were it true that the presence of the area-way did so operate upon Piotrowski's mind, the city would not, on that account, be responsible. No one is liable for more than the natural and probable consequences of his negligence and it was neither natural nor probable that the presence of the area-way should so operate. It would be idle to speculate upon what would or would not have happened if the area-way had been guarded or had not been there, with reference to plaintiff being injured; for whatever conclusion one would come to would be but a conjecture. Upon the facts as they are the defendant's negligence was not the proximate cause of the injury. There was no immediate causal connection between the presence of the area-way and the happening of the injury. An element intervened. Seymour *v.* Union Stock Yards Co., 224 Ill. 579, 585; Cole *v.* German Savings & Loan Soc., 59 C. C. A. 593, 124 Fed. 113; Terminal R. R. Assn. *v.* Larkins, 112 Ill. App. 366.

Counsel for plaintiff rely upon Siegel, Cooper & Co. *v.* Trcka, 218 Ill. 559. The doctrine of that case is (p. 562–3), that, if a defendant is guilty of negligence, which negligence is an element in the proximate cause of the injury, then it makes no difference, as to liability, that some act or agency of some other person or thing also contributes to bring about the result for which damages are claimed. There are two distinctions between that case and the case at bar. According to the expressions in the opinion in that case the court was considering a case, where, in point of fact, two contributing acts of negligence constituted

the proximate cause. Here, in point of fact, we find in the act of Piotrowski, alone, the efficient and direct proximate cause. Another distinction is that in that case, as appears from the language of the opinion, the two parties who occasioned the injury were both guilty of mere negligence, while in the case at bar the party we, so far as this case is concerned, consider responsible for the happening and whose act was the proximate cause, was guilty of a wilful act of violence which, as shown, preceded the city's mere negligence as a proximate cause.

For reason indicated the judgment of the Superior Court must be reversed without remanding.

Reversed.[1]

Mr. Justice BAKER dissenting.

McINTIRE v. ROBERTS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1889.

[*Reported* 149 *Mass.* 450.]

There was evidence tending to prove the following facts. The defendants had occupied the building in question for several years. The elevator well, in which ran a freight elevator used by the defendants in their business, was in the front part of the building. An entrance was afforded to this well directly from the street and across the sidewalk through an opening five or six feet wide and about ten feet high cut through the front wall of the building. The base or sill of this opening was formed by a stone about eighteen inches in width, which sill did not project beyond the front line of the building, and was raised about three inches above the surface of the sidewalk. On each side of this opening, about two feet and ten inches above the surface of the sill, there was a notch in the wall to support a bar to protect persons on the sidewalk from falling into the well. On August 26, 1887, about five o'clock in the afternoon, the sidewalk in front of the building was obstructed by men engaged in unloading iron castings from a wagon backed up against the curbstone, and in carrying them across the sidewalk and piling them against the building preparatory to placing them through this opening upon the freight elevator. The plaintiff, who was sixty-two years of age and lived in the vicinity, was at the time passing along Merrimack Street on his way to his home. When the

[1] See also Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379; Alexander v. New Castle, 115 Ind. 51. — ED.

wagon was unloaded, he proceeded to pass by on the sidewalk, and was opposite the opening, which was then unguarded by the bar, when the horse attached to the wagon suddenly backed the wagon upon the sidewalk, forcing against him the persons upon the sidewalk between himself and the wagon, and these persons pushed him towards the defendants' building. The plaintiff's feet struck against the stone sill of the opening, and he fell down the well into the defendants' cellar, sustaining the injuries.

FIELD, J.[1] If it be assumed that, when a building abuts upon a street, it is for the authorities of the city or town to determine whether the entrances into the building from the street are so constructed that they may be permitted to remain, — and if it be also assumed that, when entrances are permitted which are constructed so as to be closed when not in use by doors or some other barrier, the occupier of the building is liable in damages to travellers upon the street if the doors are negligently left open or the barrier left down whereby the street becomes unsafe and the travellers are injured,— still we are of opinion that the facts stated in the report do not show, or tend to show, negligence on the part of the defendants. It does not appear that the opening was not constructed so as to be closed with doors, or by a proper barrier, when the elevator was not in use. The stone sill was about three inches above the sidewalk; the opening was but five or six feet wide, and nearly at a right angle with the line of the sidewalk, and the wall of the building was about eighteen inches thick. It was impossible that any traveller using due care in the daytime should mistake the opening for a continuation of the sidewalk. The only danger was that a person on the sidewalk might be pushed into the opening, as he might be pushed against the wall of the building, or against or through a window, or against a door. The elevator at the time of the accident was in use for carrying up the iron castings which were being unloaded from the wagon which had been backed up against the curbstone of the sidewalk. The accident that happened was one that could not reasonably have been anticipated, unless the horse was vicious, or there was negligence in managing him, and it does not appear that the horse belonged to the defendants, or that the persons who were unloading the castings or were in control of the horse were servants of the defendants.[2]

[1] Part of the opinion is omitted. — ED.

[2] See also Siegel, Cooper & Co. v. Trcka, 218 Ill. 559, 75 N. E. 1053. — ED.

STATE v. WOOD.

SUPREME COURT OF VERMONT. 1881.

[*Reported* 53 *Vt.* 560.]

VEAZEY, J.[1] . . . We think the exception to the charge of the court to the jury in response to the sixth request must be sustained. The evidence on the part of the State showed that Luman A. died from the effects of the wound inflicted by Alma, and not from that inflicted by Wood; and their evidence tended to show that there was no concert between them, but that each acted independently.

The court instructed the jury in substance that although Luman A. died of the wound inflicted by Alma and not from that inflicted by Wood, and although there was no concert between them, and each acted independently, and they were therefore only responsible for their own acts respectively, still if the wound inflicted by Wood was mortal, and would in course of time have killed Luman A., if he had not previously died from the wound inflicted by Alma, and although he did not die of the wound by Wood, yet the latter could be convicted of murder.

The court was in error in the assumption that a man can be convicted of murder although his act does not cause the death. The question does not turn upon the moral aspect of the case. The intent to murder may be never so plain, yet if something intervenes to prevent the consummation of the intent, if death does not follow from the act of the accused, he is not in law a murderer. All of the definitions of murder found in the books involve the idea and fact of a killing. This must have reference, when a man is on trial, to a killing by him. If one inflicts a mortal wound, but before death ensues, another kills the same person by an independent act, without concert with, or procurement of, the first man, how can he be said to have done the killing? The second person could be convicted of murder, if he killed with malice aforethought, and to convict the first man would be assuming that he killed the same person at another time. See State *v.* Scates, 5 Jones Law (N. C.), 420.

Upon the supposition contained in the request and charge, and upon the showing made by the State that Luman A. died from the shot given by Alma and not by that given by Wood, the latter could not be convicted of any crime under this indictment. The statute, s. 12, ch. 120, Gen. Sts., providing that a person put on trial for murder may be acquitted of that, and found guilty of manslaughter, would not apply to Wood's case, because upon the supposition stated, there was no death from this act. The evidence on the part of the State, as assumed in the supposition, tends to show that Wood is guilty of an assault with intent to kill, being armed with a dangerous weapon. The statute does not provide that a person may be found guilty of this crime under an indictment for murder.

[1] Only so much of the opinion as discusses the question of causation is given. — ED.

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DE CAMP v. SIOUX CITY.

SUPREME COURT OF IOWA, 1888.

[*Reported* 74 *Ia.* 392.]

ROTHROCK, J. There is but little controversy as to the material facts in the case. The plaintiff is an expressman. He used an express wagon and one horse in carrying on his business. On the nineteenth of September, 1885, he was driving along Fourth street, in said city, his horse going in a walk. He was met in the street by a butcher's wagon, in which there were two men. The wagons collided, by reason of which the plaintiff was violently thrown out upon the ground, his wagon upset, his wagon-bed fell on top of him, his horse ran away, and there was a general smash-up of his wagon. The injury to the plaintiff was not, however, occasioned by the running of his horse, but by the collision with the butcher's wagon. One of the men in the butcher's wagon, who was a witness for the plaintiff, testified that said wagon was driven, at the time of the accident, at the rate of ten to fifteen miles an hour. All of the other witnesses who testified on this point concur in the statement that said wagon was driven very fast. A witness for plaintiff, who saw the whole occurrence, stated that the team was going at the rate of fifteen miles an hour, and did not check speed until they were stopped by the collision. Another witness stated that the team was traveling "at a great rate," and "terrible fast." There was a city ordinance in force at the time of the accident prohibiting the driving of any vehicle in any street of the city faster than at the rate of six miles an hour, or driving "in such manner as to come in collision with or strike any other person or object." The plaintiff claims that the city is liable for his injuries, because it permitted the street-car tracks which were in the street to become out of repair to such an extent that the iron rails were so much above the surface of the street that, as the vehicles approached each other, the plaintiff and the driver of the butcher's wagon could not turn out so as to avoid the collision, because they could not pull the wheels of the wagons over the rails, although they endeavored to do so; that the wheels of the wagons slid along the rails, and thus caused the collision. The defendant requested the court to give to the jury the following, among other instructions:

"If the jury find from the evidence that the accident by which the plaintiff was injured was caused by the negligence of the city in not keeping its street in repair, combined with the acts of a third party for which the city was not responsible, and would not have happened but for the acts of such third party, then the city is not liable."

"If the jury find from the evidence that, although the defendant was negligent in keeping its streets in repair at the time and place where

the accident occurred, the accident would not have happened to the plaintiff by reason thereof without the driving of the team of Ibs upon the street-railway track in the manner in which it was driven, and that the driver of said team and wagon of said Ibs, in driving upon said railway track at the time and in the manner and at the rate of speed he did, was not using ordinary care, then the defendant is not liable."

These instructions were refused, and the court, on its own motion, charged the jury, as to this feature of the case, as follows:

"The jury are instructed that, in general, the negligence of third parties, concurring with that of the defendant to produce an injury, is no defense; but if the jury find from the evidence that the accident in question was caused or occasioned by the negligence or carelessness of the driver of the team that collided with plaintiff's team, without any fault or negligence on the part of defendant concurring therein, then the plaintiff cannot recover; but if you find that the defendant was negligent, under this charge, in permitting the defect in the street at the time of the accident, and at the place as alleged, and that such negligence and defect contributed to produce and occasion the injury in question then the fact that the driver of the wagon colliding with plaintiff's team was negligent would not defeat plaintiff's right to recover."

The defendant insists that these rulings of the court are erroneous and we think his position must be sustained. As we have said, there is no question but that the butcher's wagon was driven in a careless and negligent manner. Not only this, its rate of speed was reckless, dangerous, unlawful and criminal. Under the ordinances of the city its driver was liable to a fine of one hundred dollars, or imprisonment for thirty days. The effect of the collision was perhaps stronger evidence of the reckless conduct of the driver than the testimony of the witnesses. No such a general smash-up would have occurred if the butcher's wagon had been driven as it ought to have been. Under the undisputed facts of the case, conceding that the street was out of repair, the plaintiff, to say the least, received his injuries by reason of the combined negligent acts of the city and the driver of the butcher's wagon. More than this, the reckless driving was the immediate and proximate cause of the injury. There is no warrant in the evidence for a finding that, if the team had been driven at a lawful and proper rate of speed, the collision would have nevertheless injured the plaintiff. This being so, the condition of the street was not the direct and proximate cause of the injury. Whatever the rule may be in other states, we think that the law in this state is settled that, under such circumstances, there can be no recovery against the city. See Dubuque Wood & Coal Ass'n *v.* City of Dubuque, 30 Iowa, 184, and Knapp *v.* Sioux City & Pac. Ry. Co., 65 Iowa, 91. *Reversed.*[1]

[1] See also Sweet *v.* Perkins, 196 N. Y. 482, 90 N. E. 50.

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WASHINGTON & GEORGETOWN RAILROAD CO. *v.* HICKEY.

SUPREME COURT OF THE UNITED STATES, 1897.

[*Reported* 166 *U. S.* 521.]

PECKHAM, J., delivered the opinion of the court.

This action was brought by the defendants in error, who are husband and wife, to recover from the defendants (the one being a horse car company and the other a steam railroad company) damages for personal injuries sustained by the wife on account of the alleged negligence of the servants of the defendants. The facts of the negligence were alleged in the declaration, and each defendant filed a plea of not guilty, upon which issue was joined. A trial was had in the Supreme Court of the District of Columbia, resulting in a verdict for the plaintiffs, the judgment upon which having been affirmed by the Court of Appeals, the defendants have brought the case here for review.

On the trial evidence was given tending to show these facts: Mrs. Hickey, one of the plaintiffs, who was living with her husband in the city of Washington, left her home therein on the morning of the 12th day of August, 1889, and took a street car of the defendant horse railroad company at the corner of Pennsylvania Avenue and Seventh Street for the purpose of going south along the last-named street; the car was a summer car and crowded with people going to the river on an excursion; she sat on the outside of the third seat in the front of the car and in a very small space; the people seemed in a hurry and some of them called out frequently to the driver to "hurry up"; upon coming to the crossing of Seventh Street and Maryland Avenue, where the car tracks of the two corporations intersect each other, the steam cars were seen approaching the intersection at quite a rapid rate; the street car stopped upon coming to the crossing, as the railroad gates were lowered; then and before the steam train came on they were raised, and the street car was started, and after it got on the track of the steam cars the gates were again lowered, shutting in the street car, the gates coming down, one on the car and one just behind the horses. When the street car entered upon the steam car crossing, the train on the tracks of the latter company was still moving quite rapidly towards the crossing and but a short distance away and in plain sight from the horse car; after getting partially upon the steam railroad track, the gates, as stated, came down, and then they were again raised, and the driver of the horse car whipped up his horses and the car got across. Before the horse car had crossed the tracks, the steam cars were coming pretty fast; the men who were sitting down in the horse car all got up and the women commenced screaming; the people on the horse car rushed to get off, and Mrs. Hickey was, in the course of the excitement and commotion, pushed off the car and was badly and permanently injured; when she fell, the steam cars were coming down and the horse

car (the gates having been raised) was then driven across to the other side; the train was so close to the horse car that it just got off the track in time to escape being run over, while Mrs. Hickey says she was so near the steam car tracks when the train passed that she felt the air from the engine upon her head.

One of the witnesses said that the driver of the street car first noticed the train when he was about 50 feet from the steam car track. His car was moving at the rate of four and a half to five miles an hour, and the train was then between Eighth and Ninth streets, about 300 feet from Seventh Street. The driver wanted to cross the steam car tracks before the gate went down, and thought he could do so without danger; he did not see that the gates were being lowered as he approached, and did not put on the brakes or make other effort to stop the car until "he got the bell." The gates were once lowered and then raised to let the car pass, and then they were again lowered, and it was when they were lowered the second time that they came down between the car and the horses, penning the car in on the steam track. The gates were raised again, and the driver succeeded in getting the horse car across the track before the train approached.

The counsel for the horse car company claimed that the cause of the accident was the commotion immediately preceding it, and by reason of which the plaintiff was pushed from the car and injured, and the question was, what caused the commotion? He urged that the commotion was caused by the improper and negligent lowering of the gates at the time when they penned the horse car between them and prevented its progress across the tracks of the steam car company, and that if the gates had not been thus lowered the horse car would have had plenty of time to cross, and there would have been no commotion and no accident. He, therefore, made several requests to the court to charge the jury upon that subject. The point of such requests was that if the jury should find that the commotion and confusion which led to the accident were caused by the sudden and negligent lowering of the gates upon the street car, which the driver of that car had no reason to believe would be thus lowered, and if the driver could have crossed in safety but for such lowering, then the horse car company was not responsible, and no recovery could be had against it.

A further request was made to charge that there was no evidence that the management of the horse car entered into or contributed to the negligence of the gatekeeper, and if the jury should find that the injury was caused by the negligence of the gatekeeper, the verdict must be in favor of the horse car company; also, that if the jury should find that the horse car would have passed the steam car track without injury to the plaintiff except for the lowering of the gates upon the horse car, and that the lowering was the cause of the injury and was an act of negligence on the part of the gatekeeper, then the horse car company was not responsible for the injury; also, that if the jury

found the injury to have been the result of negligence of the gatekeeper in the management of the gates, and that but for such negligence the injury would not have been sustained by the plaintiff, and that the driver of the horse car did not know and had no reason to believe that the gatekeeper would be negligent, then the plaintiffs were not entitled to recover against the horse car company.

The refusal of the court to charge as requested was excepted to and is now made a ground for the reversal of the judgment by this court. In his argument here the counsel for the horse car company said: "The gist of all of which instructions is that no matter whether it was negligence or not for the street car company to drive its car upon the steam car track, yet, if the jury found that it was the lowering of the gates (and not the negligence, if it were such, in going upon the steam track) that caused the injury, then they should find for the street car company. The gist of the instructions is that it was the lowering of the gates that caused the injury."

The vice in all this argument, as we think, consists in the attempted separation into two distinct causes (remote and proximate) of what in reality was one continuous cause. It leaves out of view the action of the driver of the street car as to whether he was or was not negligent, provided the jury should say the accident would not have happened if the gates had not been improperly lowered. That is, although the jury should find that the act of the driver was negligent, and by reason of that negligence his car was placed in such a position that the negligent lowering of the gates concurred with his action in producing the injury, the street car company must be absolved, if the jury should be able to say that but for such negligent lowering of the gates (which the driver of the horse car had no reason to foresee) the accident would not have happened. This is an attempt to separate that which upon the facts in this case ought not to be separated. The so-called two negligent acts were, in fact, united in producing the result, and they made one cause of concurring negligence on the part of both companies. They were in point of time substantially simultaneous acts and parts of one whole transaction, and it would be improper to attempt a separation in the manner asked for by the counsel for the horse car company.

In this connection the court did charge the jury as follows:

"It is claimed by the counsel for the Washington and Georgetown Railroad Company that there was ample time for its cars to pass over the track of the Baltimore and Potomac Railroad Company before the train of the latter would reach the point of intersection of the two tracks, and that as the car of the former company approached the track of the latter the gates were up, and that the horses drawing the car had reached the steam car track when the gatekeeper suddenly lowered the gates, and thereby produced whatever alarm or confusion the evidence shows ensued among the passengers, including the plaintiff, on the street car.

"If you find the evidence establishes these facts, as thus claimed by the Washington and Georgetown Railroad Company, it would be entitled to your verdict in its favor."

The alleged negligence of the horse car driver consisted in endeavoring to cross at all, under the circumstances, until after the passage of the train on the steam railroad. Upon the evidence the jury would have been justified in finding that he had no right to indulge in any close calculation as to time in attempting to cross the steam car tracks before the train thereon reached the point of intersection; that it was a negligent act in making the attempt under a state of facts where the least interruption or delay in the crossing over by the horse car would probably lead to an accident. In this view of the evidence and finding, it was not material that the driver had no ground to expect the particular negligent act of lowering the gates and the consequent obstruction to his passage across the steam car tracks, or that he would have had time to cross if the delay thus occasioned had not occurred. The jury had the right to find it was negligent to cause his car to be so placed that any delay might bring on a collision. The apparent liability to accident, if any delay should occur from any cause whatever, was plain, and such fact would support a finding of negligence in attempting to cross before the steam car train had passed. In such case it would be no excuse that the particular cause of a possible or probable delay, viz., the lowering of the gates, was not anticipated. The important fact was that there existed a possibility of delay, and, therefore, of very great danger, and that danger ought to have been anticipated and avoided. A delay might be occasioned at that time by an almost infinite number of causes; the horses might stumble, the harness might give way, the car might jump the track; a hundred different things might happen which would lead to a delay, and hence to the probability of an accident. It was not necessary that the driver should foresee the very thing itself which did cause the delay. The material thing for him to foresee was the possibility of a delay from any cause, and this he ought naturally to think of, and a failure to do so, and an attempt to cross the tracks, might be found by the jury to be negligence, even though he would have succeeded in getting across safely on the particular occasion if it had not been for the action of the gatekeeper in wrongfully lowering the gates. The act of the driver being a negligent act, and that act being in full force and in the very process of execution at the time the accident occurred, which accident would not have happened but for such negligent act, the fact that another negligent act of a third party contributed to the happening of the accident would not absolve the horse car company. The negligent act of the horse car driver joined with and became a part of the other act in wrongfully lowering the gates, as described, and both acts constituted but one cause for the commotion which naturally resulted therefrom, and on account of both of these acts, as parts of a whole transaction, the injury occurred.

In Insurance Company *v.* Tweed, 7 Wall. 44, which was an action upon a policy of insurance that contained an exception against fire that might happen "by means of an invasion, insurrection, riot or civil commotion, or any military or usurped power, *explosion*, earthquake or hurricane," the insurance company was held not liable, although the fire by which the premises insured were burned was not directly caused by the explosion. The explosion occurred in another warehouse, by reason of which a fire was started that caught in still another building, and the fire from that building was communicated to the premises which were insured, and which were in that manner destroyed by the fire. The court held that, as the whole fire was continuous from the time of the explosion, and was under full headway in about a half an hour, the loss by fire was within the exception contained in the policy, and the insurers were not liable. In that case the question of proximate and remote causes was alluded to, and it was said, by Mr. Justice Miller, that "one of the most valuable of all the *criteria* furnished us by the authorities by which to distinguish the remote from the proximate cause of damage was to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote." In one sense there was in that case a new cause existing in the fact that the explosion caused a fire in another building first, and that the fire was carried by the wind from that building to the building in question and not from the building in which the explosion occurred, and so it was claimed that the fire in the building covered by the policy was not directly caused by the explosion; but the court held that the distinction was not well founded, and that within the policy the insurers were not liable. The fire, in other words, occurred by means of the explosion, and no new cause could be said to have intervened simply because the premises insured were burned by the fire communicated from a third building.

The case of Scheffer *v.* Railroad Company, 105 U. S. 249, is an example of the other side. It was there held that where the passenger was injured by reason of a railway collision, and as a result of such injury he became disordered in mind and body, and some eight months after the collision committed suicide, his personal representatives could not maintain an action against the railway company for his death, as his own act was the proximate cause thereof. It was held that the relation of the negligence of the railroad company to the death of the passenger was too remote to be regarded as a cause of such death, or to justify a recovery against the company. Mr. Justice Miller, in delivering the opinion of the court, said:

"The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering and eight months' disease and medical treatment to

the original accident on the railroad. Such a course of possible or even logical argument would lead back to that 'first great cause least understood,' in which the train of all causation ends.

"The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train.

"His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials, as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him and his death."

So in Carter *v.* Towne, 103 Mass. 507, and Davidson *v.* Nichols, 11 Allen, 514, cited by counsel, the intervention of another and sufficient cause to produce the result is apparent.

In the first case whatever of fault there was in the sale of the gunpowder by the defendant to the boy became absolutely blotted out when, with the knowledge of his aunt, who had the charge of him and the house where he was living, it was placed in the cupboard, and a week afterwards his mother gave him some of the powder and he fired it off with her knowledge. The fact that some days later he took, with her knowledge, more of the powder and fired it off and was injured by the explosion, could not in any rational degree be said to be caused by the original wrongful sale of the powder.

In the other case the druggist sold an article harmless in itself, mistaking it for another article, also harmless in itself, but another person afterwards intermixed the article sold with another article, making thereby a dangerous explosive from which injury was suffered. It was held that there could be no recovery against the druggist, because the sale was not the proximate cause of the accident.

These are plain cases of the intervention of other and sufficient causes for the injuries sustained and where the original actions were too remote to be regarded as causes of such injuries. The other cases cited by counsel are clearly distinguishable in principle from this one. It is unnecessary after what has been said to further comment on them.

We think there was no error in the refusal of the court to charge as requested, and the exceptions to such refusal are therefore untenable.

Another objection now urged by the counsel for the defendant railroads is to the charge of the learned judge on the subject of damages. In response to the request of counsel for plaintiffs the judge charged that —

"If the jury find from all the evidence that the plaintiffs are entitled to recover in this action, then they shall award such damages *within the limits of the sum claimed in the declaration* as will fairly and reasonably compensate the plaintiff Margaret for the pain and suffering caused to

her by the injury which she sustained and for the injury to her bodily health and power of locomotion, if any such they find, which she has sustained in the past and will continue to sustain in the future as a natural consequence of said injury, and for such internal injuries and impairment to her physical health as they may find to be established by the evidence."

And the judge also charged:

"Your verdict, if you find for the plaintiff, must be a matter to be fixed by you in the exercise of a sound discretion, subject, of course, to the limits placed in the declaration of thirty thousand dollars."

The objection which the counsel makes to this charge is that it amounted to a direct intimation to the jury that the finding of a verdict for the sum named in the declaration would not be excessive, and that the jury were misled by it, for they brought in a verdict for the plaintiff for $12,000, which the court actually found to be excessive, and directed that the verdict should be set aside unless plaintiffs consented to remit $6000, which they did.

But we fail to find from the record that any exception was taken to the charge of the judge upon this subject of damages. We do not intimate that an exception would have been good, if it had been taken; it is sufficient that no exception raises the question, and we do not therefore either discuss or decide it.

It is also objected that there is a variance between the declaration and the proof, and that the trial court did not try the issues formed by the pleadings, but went beyond them and made a new case for the plaintiffs.

The declaration alleges that the female plaintiff was pushed and shoved from her seat in the car and thrown violently to the ground and was injured in that way. The court charged the jury that if they should find from the evidence that the female plaintiff either jumped off the car in a reasonable effort to avoid injury from collision, or was pushed or thrown from the car by some other passenger or passengers endeavoring in a reasonable manner to avoid injury from such collision, and was thereby injured, then the plaintiffs were entitled to recover.

Upon this subject of variance it was said by Mr. Chief Justice Alvey, in delivering the opinion of the Court of Appeals in this case, that —

"Whether she [Mrs. Hickey] fell in consequence of a push received from some other terrified passenger, or in an attempt to save herself by jumping from the car, it would make no material difference in her right to recover. It is not so much the manner of leaving the car as it was the exciting cause that operated upon her, either directly and caused her to jump to save herself, or upon others whose actions were justifiably incited by the impending danger, and, by natural, impulsive movement, forced her from the car. In either case, her fall to the ground and injury were the direct consequences of the apparent and impending danger produced by the negligent conduct of the defendants'

servants and employees. There is, therefore, no such variance as should defeat the plaintiffs' right to recover, if the facts were found to exist, as we must assume they were, according to the hypothesis of the instruction given by the court. It is said by the Supreme Court of the United States that no variance ought ever to be regarded as material where the allegation and proof sustantially correspond, or where the variance was not of a character which could have misled the defendant at the trial. Nash *v.* Towne, 5 Wall. 689, 697. Here the variance that is supposed to exist was mainly produced by the proof introduced on the part of the defendants, and therefore there was no surprise to them, and it is not pretended that they were, in any manner, injured by the supposed variance. There is in reality no substantial variance between the allegations and proof."

We think this is a correct statement, and nothing more need be said upon the subject.

These are all the questions raised by the counsel for the horse railroad company which we think it necessary to mention.

We have carefully examined the various points raised by the learned counsel for the steam railroad company, and are of opinion that they show the existence of no material errors in the conduct of the trial which could or in any way did prejudice the company. There was proper and sufficient evidence submitted to the jury on the question of the employment of the gateman by the steam railroad company. Although there was no direct evidence of an actual contract of employment entered into between the company and the gateman, yet there was ample evidence from which an inference of such employment might properly have been drawn by the jury. We also think the duties of a person so employed were correctly stated to the jury. The question whether the gateman neglected to properly discharge those duties was submitted to the jury in a manner to which no exception could be taken.

Upon an examination of the whole case, we find no error prejudicial to either company, and the judgment against both must be

Affirmed.[1]

CITY OF LOUISVILLE *v.* HART.

COURT OF APPEALS OF KENTUCKY, 1911.

[*Reported* 142 *Ky.* 171.]

CARROLL, J. Edward Hart, while driving a one-horse wagon on Payne Street, in the city of Louisville, was thrown from it in front of a street car and killed by the car. To recover damages for his death, the administrator brought an action against the city of Louisville and the Louisville Railway Company, charging that the accident that

[1] Townsend *v.* Boston, 187 Mass. 283, 72 N. E. 991; Galveston H. & S. A. Ry. *v.* Vollrath, (Tex. Civ. App.) 89 S. W. 279. — ED.

resulted in his death was due to the negligence of the city in failing to keep the street at the point of the accident in a reasonably safe condition for public travel, and to the high and dangerous rate of speed at which the street car was running and the negligence in its operation.[1] . . .

Another reason for reversal is that the condition of the street was not the proximate cause of the death of Hart, and therefore the city was not liable. The question of proximate cause in negligence cases has come before the courts of the country in innumerable cases, and as a result there is a large body of law devoted to its consideration. But there is really no difference of opinion as to the general principles upon which this doctrine rests. It is agreed on all sides that the damage suffered must, as stated by Cooley on Torts, p. 68, "be the legitimate sequence of the thing amiss. . . . In other words, the law always refers the injury to the proximate, not to the remote, cause. The explanation of this maxim may be thus given: If the injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote."

Or, as stated by Shearman & Redfield on Negligence, § 26: "The proximate cause of an event must be understood to be that which in a natural and continuous sequence, unbroken by any new independent cause produces that event, and without which that event would not have occurred. Proximity in point of time or space, however, is no part of the definition. That is of no importance, except as it may afford evidence for or against proximity of causation; that is, the proximate cause which is nearest in the order of responsible causation." The difficulty has always come up when it has been attempted to apply these principles to a state of facts presenting more than one contributing cause or act that resulted in the wrong or injury complained of. Of course, when there is only one cause to which the injury or wrong is directly traceable, as when a person intentionally shoots another, or where a passenger on a railway train is injured by a defect in the car in which he is riding, there is no difficulty in determining what was the proximate cause of the injury. But in cases in which there is more than one cause or act connected with or concerned in producing the injury the books are full of decisions determining which one of the causes or acts was the proximate cause. As a result of the infinite variety of cases presenting this question, it is easy to find authority that will apparently support each side in almost any controversy in which a doubtful question arises. To attempt to reconcile these cases would be the height of folly. In truth, when carefully studied, there is really little conflict between them. The apparent conflict grows out of the

[1] Part of the opinion is omitted. — Ed.

difference in facts to which must be applied the principle that controls. Or, as stated by Justice Miller in Louisiana Mutual Ins. Co. v. Tweed, 7 Wall. 44, 19 L. ed. 65, in speaking of this subject: "It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations."

No case can be confidently cited as authority unless its facts are similar to the facts of the case under consideration, and so it would not be useful to review the many cases cited by counsel for appellant, as few of them are directly in point. To again restate briefly, we have this state of facts: Hart on account of defects in the street that rendered it unsafe for travel was thrown from his wagon, and fell on the street car track immediately in front of an approaching car that was running at a dangerous and negligent rate of speed, and was run over and killed by the car. Now we may assume that, if the street had been reasonably safe, he would not have been thrown from his wagon, and, of course, would not have been killed. We may further assume that if the street car had been operated with ordinary care that it could have been stopped before striking him, and so, although the defective condition of the street caused him to fall on the track, he would yet have escaped injury except for the negligence in the operation of the car. We have, then, two approximately concurring acts of negligence by two independent agencies that brought about his death. Neither act of negligence in itself without the coöperation of the other would have harmed him. On the other hand, however fast the car was going, unless he had been thrown in front of it, he would not have been killed. On the other hand, although thrown on the car track by the bad street, he would have escaped death if it had been prudently operated. The question now is which of these acts of negligence was the proximate cause of his death. We think that both of them may be so treated.

Two agencies acting entirely independent of each other as in this case may jointly and concurrently be the proximate cause of an injury, when it would not have happened except for the concurrence at approximately the same time and place of the two negligent acts. Thus, in Cooley on Torts, p. 78, it is said: "If the damage has resulted directly from concurrent wrongful acts or neglects of two persons, each of these acts may be counted on as the wrongful cause and the parties held responsible either jointly or severally for the injury." In Shearman & Redfield on Negligence, § 39, the rule is thus stated: "It is also agreed that if the negligence of the defendant concurs with the other cause of the injury, in point of time and place, or otherwise so directly contributes to the plaintiff's damage that it is reasonably certain that the other cause alone would not have sufficed to produce it, the defendant is liable notwithstanding he may not have anticipated or been bound to anticipate the interference of the superior force

which concurring with his own negligence produced the damage." In § 346 the same authors say: "The general rule in all states is that where two causes combine to produce an injury to a traveller upon a highway, both of which are in their nature proximate, the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible, the municipality is liable, provided the injury would not have been sustained but for such defect."

As illustrative cases on the subject treated of by these standard authors, we mention out of a number the following:

In Louisville Home Telephone Co. *v.* Gasper, 123 Ky. 128, 93 S. W. 1057, 9 L. R. A. (N. S.) 548, the facts were these: Gasper while walking in a public alley adjoining his home in the city of Louisville was knocked down and crushed by and under a heavy wagon owned and operated by Dressle. The Louisville Home Telephone Company maintained in the alley a telephone pole, to which it negligently strung and maintained a guy wire, running obliquely from the top thereof to a block in the ground, so as to form and cause a dangerous obstruction to pedestrains and vehicles using or passing through the alley. The wagon of Dressle, while being driven through the alley by his servants in a negligent manner, ran upon and against appellant's guy wire, which caused the wagon to be overturned and thrown upon Gasper, resulting in his injuries. Under these facts, the contention of the telephone company was that Gasper was injured solely by the wagon falling upon him, and that its negligence, if any, was too remote to have produced the injury without an intervening cause, and therefore its negligence was not the proximate cause of the injury. But the court, rejecting this view, said: "If the telephone company was negligent as to the manner in which its guy wire was anchored, and it constituted a dangerous obstruction — that is, one that was likely to result in injury to others from an intervening cause — which, though not in fact anticipated by appellant, would not have happened but for its earlier negligence, it cannot escape liability, because its negligence would in such case be the proximate cause of the injury. . . . It is also very well settled that when an injury is caused by two causes concurring to produce the result, for one of which the defendant is responsible and not for the other, the defendant cannot escape responsibility. One is liable for an injury caused by the concurring negligence of himself and another, to the same extent as if for one caused entirely by his own negligence."

In Walrod *v.* Webster County, 110 Iowa, 349, 81 N. W. 598, 47 L. R. A. 480, the court had before it a case in which two independent causes contributed to the injury, and said: "When two causes combine to produce an injury to a traveller upon a highway, both of which are in their nature proximate, the one being a culpable defect in the highway and the other some occurrence for which neither is responsible, the municipality is liable provided the injury would not have been sustained but for such defect. . . . The mere fact that some other

cause operates with the negligence of the defendant to produce the injury does not relieve it from liability. His original wrong concurring with some other cause, and both operating approximately at the same time and producing the injury, makes him liable, whether the other cause was one for which the defendant was responsible or not."

In Lake v. Milliken, 62 Me. 240, 16 Am. Rep. 456, it appears that the defendants negligently piled boards in the traveled part of a highway, and that a stranger passing along with a wagon loaded with barrels ran over these boards, producing a rattling noise, which frightened the plaintiff's horse, causing him to throw the plaintiff from his wagon and injure him. In holding the defendants liable, the court quoted with approval from Ricker v. Freeman, 50 N. H. 420, 9 Am. Rep. 267, the following statement: "We think the principle is clearly established that negligence may be regarded as the proximate cause of an injury of which it may not be the sole and immediate cause. If the defendant's negligent, inconsiderate, and wanton, though not malicious, act concurred with any other thing, person, or event, other than the plaintiff's own fault to produce the injury, so that it clearly appears that but for such wrongful negligent act the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible, even though his negligent wrongful act may not have been the nearest cause in the chain of events or the order of time."

Applying to the facts of this case the principles announced, we have no difficulty in reaching the conclusion that the defective street was one of the proximate causes that resulted in the death of Hart, and therefore an action would lie against the city as well as the street railway company.

Another error assigned is that the court should have defined "proximate cause." In our opinion a definition of "proximate cause" would have confused rather than enlightened the jury. They were told by an instruction that: "If they believe from the evidence that the dangerous and defective condition of Payne Street at or about where the collision occurred, if it was dangerous or defective, caused the plaintiff's decedent to be thrown from his wagon and upon the track of the Louisville Railway Company and under one of its cars, whereby he was so mangled and injured that he died therefrom, then the law is for the plaintiff as against the defendant city of Louisville, and the jury should so find." This instruction left it to the jury to say whether or not the defect in the street was the cause of the injury complained of, and we do not think an instruction defining or attempting to define "proximate cause" would have aided the jury in reaching a correct verdict. The trial court correctly determined as a matter of law that the city was liable if the defect in the street brought about the death of Hart, and left to the jury the question whether it did or not.

REGINA v. HAINES.

WORCESTERSHIRE ASSIZES. 1847.

[*Reported* 2 *Carrington & Kirwan*, 368.]

MANSLAUGHTER. — The first count of the indictment stated that the prisoner, in and upon one James Shakespeare did make an assault; and that it was the duty of the prisoner to ventilate and cause to be ventilated a certain coal mine, and to cause it to be kept free from noxious gases, and that the prisoner feloniously omitted to cause the mine to be kept ventilated, and that the noxious gases accumulated and exploded, whereby the said J. S., who was lawfully in the said mine, was killed.

It appeared that a mine, called Round Green Colliery, situate at Hales Owen, was the property of George Parker, Esq., and that the prisoner was a sort of manager of it, and called the ground bailiff; that another person was under him, called the butty, he being a sort of foreman, and that the deceased, who was called the doggy, was a kind of second foreman under the butty.

It further appeared, that, at about half-past six o'clock on the morning of the 17th of November, 1846, a number of men were working in a large chamber in the colliery, when there was an explosion of fire-damp, by which nineteen persons, including the deceased James Shakespeare, were killed; and it was imputed, on the part of the prosecution, that this explosion would have been prevented if the prisoner had caused an air-heading to have been put up, as it was his duty to have done. But it was sought to be shown by the cross-examination of the witnesses for the prosecution, that it was the duty of the butty (who was one of the persons killed by the explosion) to have reported to the prisoner as ground bailiff that an air-heading was required; and that, as far as appeared, he had not done so.

Allen, Serjt., for the prisoner, submitted, first, that the prisoner was not guilty of any negligence at all, as it was only his duty to cause air-headings to be put up on the requisition of the butty; and, secondly, that a person who was guilty only of breach of duty by omission, could not be found guilty of manslaughter; for that, in order to constitute that offence, there must be some wrongful or improper act done by the prisoner, except in those cases where there was a liability known to the law, such as providing an infant with food, or the like. He cited the case of Regina *v.* Allen.

MAULE, J. (in summing up). The prisoner is charged with manslaughter, and it is imputed that, in consequence of his omission to do his duty, a person named Shakespeare lost his life. It appears that the prisoner acted as ground bailiff of a mine, and that, as such, his duty was to regulate the ventilation, and direct where air headings should be placed; and the questions for you to consider are, whether

it was the duty of the prisoner to have directed an air-heading to be made in this mine; and whether, by his omitting to do so, he was guilty of a want of reasonable and ordinary precaution. If you are satisfied that it was the ordinary and plain duty of the prisoner to have caused an air-heading to be made in this mine, and that a man using reasonable diligence would have had it done, and that, by the omission, the death of the deceased occurred, you ought to find the prisoner guilty of manslaughter. It has been contended that some other persons were, on this occasion, also guilty of neglect. Still, assuming that to be so, their neglect will not excuse the prisoner; for, if a person's death be occasioned by the neglect of several, they are all guilty of manslaughter; and it is no defence for one who was negligent to say that another was negligent also, and thus, as it were, try to divide the negligence among them.

Verdict, Not guilty.

Huddleston and *Hooper*, for the prosecution.
Allen, Serjt., and *Whitmore*, for the prisoner.

REGINA *v.* DAVIS.

HERTFORDSHIRE ASSIZES. 1883.

[*Reported* 15 *Cox C. C.* 174.]

THE prisoners, George Davis and Charles Wagstaffe, were indicted for the manslaughter of James Butterworth, at Chipping Barnet.

Fulton and *Beard* were counsel for the prosecution.

Sims was counsel for Davis, and *Montagu Williams* and *F. Turner* for Wagstaffe.

From the evidence it appeared that about 10.30 o'clock on the evening of the 5th day of September, 1882, the deceased man Butterworth with some friends were passing the shop of Davis, a greengrocer, in High Street, Barnet. He went into the shop and asked Mrs. Davis to serve him with an apple. Mrs. Davis for some reason refused, and he thereupon used disgusting language to her.

A few minutes afterwards her husband, the prisoner Davis, came up; abusive words then followed, and a fight ensued between Davis and Butterworth, and the latter was knocked over some baskets outside the shop. Then Marshall, one of Butterworth's friends, interfered, who, being struck by the defendant Wagstaffe (a friend of Davis), ran away, followed by Wagstaffe. Wagstaffe then returned just as Butterworth was getting up from the ground. Wagstaffe at once knocked Butterworth down again, and Butterworth then called out that "he has broken my jaw."

On examination it was found that Butterworth's jaw was broken in two places, and the following day he went to St. Bartholomew's Hospital, and the surgeon in charge decided that it would be necessary to wire his jaw, and the assistant chloroformist was sent for, and the chloroform properly applied; but death, unfortunately, took place under the operation.

The *post-mortem* examination disclosed a serious injury to the trachea, as well as tubercular disease of both lungs, the injury to the trachea being the result of a blow received during the fight.[1]

The prisoner's counsel proposed to show by evidence that the opinion formed by the medical men was grounded upon erroneous premises, and that no operation was necessary at all, or at least that an easier and much less dangerous operation might and ought to have been adopted, and contended that he might therefore cross-examine the medical witnesses for the prosecution as to the grounds of their opinion; and he submitted that a person was not criminally responsible where the death is caused by consequences which are not physically the consequences of the wound, but can only be connected with the first wound by moral reasoning; as where that which occasioned death was the operation which supervened upon the wound, because the medical men thought it necessary.

Williams. I propose to call medical evidence that the death was caused by the administration of the chloroform.

His LORDSHIP [MATHEW, J.]. It is not disputed that if the chloroform had not been administered the man would not have died.

His LORDSHIP then consulted Mr. Justice FIELD, and said: "I have no doubt at all upon the matter, nor has my brother Field, whom I have consulted; and we think, whatever may have been the case in 1846, the law is now too clear to reserve a case for the consideration of the judges, and that if the jury are satisfied that the injury to the jaw was inflicted by Wagstaffe, and that Davis aided and abetted him, then they must find them both guilty; and, on the other hand, if they think there is no sufficient evidence of concert, still they must find them both guilty if they think Wagstaffe broke the jaw, and Davis inflicted the injury to the trachea. We both think that the chloroform having been properly administered by a regular medical practitioner, the fact that death primarily resulted from its use cannot affect the criminal responsibility of the accused persons. Of course, if the jury think there was a *mêlée*, and that there is no reliable evidence of concert, and they cannot say which of the two prisoners inflicted either the injury to the jaw or the injury to the trachea, then they may if they please acquit them both."

The learned counsel for the prisoners then addressed the jury.

His LORDSHIP (in summing up the case to the jury). It might appear that the death was not due to any act of either prisoner, but to some-

[1] The statement of facts and arguments of counsel have been condensed.

thing of which at first sight they were not guilty; and that their moral guilt really went no farther than the guilt of a man who committed an assault. The prosecution did not say that there was anything more than a street fight; the injuries were serious, but perhaps no more so than where it happened that no death ensued, and the man who had broken the peace was liable. However, the case was to be dealt with according to the strict rule of law, which was that, if, although there might be no intent to do more than assault, still an injury was inflicted by one man on another which compelled the injured man to take medical advice, and death ensued from an operation advised by the medical man, for that death the assailant was in the eye of the law responsible. And if the jury were satisfied that both or either of the men were responsible for the injury to the deceased, and that Butterworth took the proper course of consulting competent medical men; that they recommended an operation for the purpose of which chloroform was administered, and he died from that chloroform, death must be traced back to the act of the man by whom the original injury was done to Butterworth. They would deal with the evidence on that principle, and whatever the consequences might be they would have to pronounce their verdict on that footing. [His Lordship then went through and commented upon the evidence, and proceeded:] The first question was, Was it Wagstaffe who injured the man's jaw? If Wagstaffe struck the blow that injured the man's jaw, or whether it was done when, as some of the witnesses said, Wagstaffe kicked him, then it was their duty to say Wagstaffe was guilty. There was evidence that the blow that injured the jaw injured the trachea. That injury to the jaw caused resorting to the hospital; competent medical men decided to perform an operation; that rendered chloroform necessary; and if under chloroform the man died, the rule of law was that the death could be traced back to the man by whom the injury was done. For it would never do to have a serious injury by one man on another, and have the issue raised that death was due to want of skill on the part of the medical men. People who inflicted injuries must deal with the law. If the jury thought there was a *mêlée*, and that the injury was not clearly brought home to Wagstaffe, they were at liberty to say the Crown had not brought home to him the death of the man. If they were satisfied Davis had nothing to do with the injury, and he thought there could be no doubt about that, and if they believed it was brought home to Wagstaffe, it would be their duty to acquit Davis and say Wagstaffe was guilty.

The jury acquitted the prisoners. *Not guilty.*

COREY v. HAVENER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1902.

[*Reported* 182 *Mass.* 250.]

Two actions of tort by the same plaintiff against different defendants for injuries to the plaintiff and to his wagon caused by the alleged negligence of both defendants, each operating a separate gasoline motor tricycle at an illegal and dangerous rate of speed and frightening the plaintiff's horse. Writs dated December 22, 1900.

In the Superior Court the two cases were tried together before Pierce, J. It appeared that the plaintiff, who was very deaf and could only hear by the use of an ear trumpet, was driving slowly in a wagon along Shrewsbury Street, a public street and main thoroughfare in Worcester; that the defendants came up from behind and passed the plaintiff at a high rate of speed one on each side; that each defendant was mounted on a motor tricycle with a gasoline engine making a loud noise and emitting steam, some of the plaintiffs' witnesses saying that the machines emitted steam and smoke, making a cloud about the defendants as they rode.

The plaintiff testified that his horse took fright when the defendants first passed but was under control and guidance until he overtook the defendants, and that running between them the horse shied and he then lost control. His wagon wheel struck another wagon going in the same direction, and the injuries to himself and his wagon occurred.

The plaintiff and each of his witnesses was asked on cross-examination if he could tell which defendant or which vehicle caused the horse to take fright, and each witness was unable to tell.

The defendants requested the judge to instruct the jury, that the evidence showing that they were on two separate vehicles entirely independent of each other, and there being two different suits for the same injury, the burden was on the plaintiff to show which one of the defendants, if either, was to blame; and that, if it was not clearly shown which one of the defendants caused the accident, the plaintiff could not recover.

The defendants also requested the judge to instruct the jury that there being two defendants and two separate suits, and the cause of action against each being for the same injury, if the jury found for the plaintiff they must assess the full damages and determine against which defendant, and that they could not assess full damages against both, as that would be giving double damages.

The judge refused to give either of these instructions. The jury found for the plaintiff in each case and in each case assessed the damages in the sum of $700. The defendants alleged exceptions.

LATHROP, J. The only question which arises in these cases is whether

the judge erred in refusing to give the instructions requested. The bill of exceptions does not set forth what instructions were given, and we must assume that they were appropriate to the case as presented by the evidence, and were correct.

The verdict of the jury has established the fact that both of the defendants were wrongdoers. It makes no difference that there was no concert between them, or that it is impossible to determine what portion of the injury was caused by each. If each contributed to the injury, that is enough to bind both. Whether each contributed was a question for the jury. Boston & Albany Railroad *v.* Shanly, 107 Mass. 568, 578, and cases cited.

It makes no difference that the defendants were sued severally and not jointly. If two or more wrongdoers contribute to the injury, they may be sued either jointly or severally. McAvoy *v.* Wright, 137 Mass. 207. The first request for instructions was therefore rightly refused.

Nor was there any error in refusing to give the second request. If both defendants contributed to the accident, the jury could not single out one as the person to blame. There being two actions, the plaintiff was entitled to judgment against each for the full amount. There is no injustice in this, for a satisfaction of one judgment is all that the plaintiff is entitled to. Elliott *v.* Hayden, 104 Mass. 180; Savage *v.* Stevens, 128 Mass. 254; Luce *v.* Dexter, 135 Mass. 23, 26; McAvoy *v.* Wright, 137 Mass. 207; Galvin *v.* Parker, 154 Mass. 346; Worcester County *v.* Ashworth, 160 Mass. 186, 189.

Exceptions overruled.[1]

GAY *v.* STATE.

SUPREME COURT OF TENNESSEE, 1891.

[*Reported* 90 *Tenn.* 645.]

LEA, J. The plaintiff in error was indicted and convicted of a nuisance in keeping and maintaining a hog-pen in a filthy condition. There were several witnesses who proved it was a nuisance. There were several who proved that the pen was kept remarkably clean, and was no nuisance; and several proved that, if there was a nuisance, it was caused by a number of hog-pens in the neighborhood.

His Honor, among other things, charged the jury: "If the jury find that the smell created by the defendant's pen was not sufficient within itself to constitute a nuisance, yet it contributed with other pens in the neighborhood to forming a nuisance, the defendant would be guilty."

This was error. The defendant can only be held liable for the consequences which his act produced. The nuisance complained of must be the natural and direct cause of his own act.

[1] See also Brown *v.* Thayer, 212 Mass. 237, 99 N. E. 237; Mathews *v.* Tramways Co., 60 L. T. Rep. 47, Smith Cas. Torts 82. — ED.

CHACEY v. CITY OF FARGO.

SUPREME COURT OF NORTH DAKOTA, 1895.

[*Reported* 5 *N. D.* 173.]

CORLISS, J. The plaintiff has recovered a judgment against the defendant, the city of Fargo, for damages sustained by her by reason of a defective sidewalk within the corporate limits of that city. While walking along this sidewalk, she was overtaken and passed by a person riding a bicycle, which threw out a loose plank immediately in front of plaintiff, who stepped into the hole in the walk, thus unexpectedly made, and sustained severe injuries. One of the contentions of defendant against its liability is that the defective walk was not the proximate cause of the injury; that plaintiff must, in law, trace her fall to the bicycle alone. Had some one, a short time before the accident, removed the loose plank, and had plaintiff thereafter been injured, the city might not have been liable, in the absence of notice of the hole in the sidewalk, for in that case the hole, and not the loose plank, perhaps, would have been the proximate cause of the injury. But the case before us presents no such question. The loose plank was one of the proximate causes of the injury, for it was the existence of such a loose plank that made it possible for a passing bicycle to throw it out of its place, and suddenly open before the plaintiff a dangerous pitfall. She was precipitated to the ground and hurt, not because there was a hole in the sidewalk, but because there was a loose plank there which might be thrown out immediately in front of her by another, thus causing her injury. Undoubtedly it is true that, but for the passing of the bicycle at that time, no accident would have occurred. But it is also true that, had it not been for the defective walk, the passing of the bicycle would have resulted in no harm to the pedestrian. Under these circumstances we regard as controlling the rule laid down by the court in Ring *v.* City of Cohoes, 77 N. Y. 83: "When two causes combine to produce an injury to a traveller upon a highway, both of which are, in their nature, proximate, the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible, the municipality is responsible, provided the injury would not have been sustained but for that fact. Where several proximate causes contribute to the accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes, but it cannot be attributed to a cause unless, without its operation, the accident would not have happened." This rule has been generally recognized, and has been applied in many cases. Its soundness cannot be questioned. See Jones, Neg. 163, and note 381; 2 Shear. & R. Neg. § 426; Elliott, Roads & S. 451, and notes; Morrill, City Neg. 106–110.[1]

[1] The remainder of the opinion contains a discussion of other questions. — ED.

PASTENE v. ADAMS.

SUPREME COURT OF CALIFORNIA, 1874.

[*Reported* 49 *Cal.* 87.]

THE defendants were lumber dealers in the city of San Francisco, and had a lumber yard on the easterly side of Stewart Street, between Howard and Folsom streets. Their office fronted on the east side of Stewart Street, which runs north and south, and there were two gangways or roads leading from the street into the lumber yard, one on the north side of the office, and one on the south, each about twelve feet wide. The distance between these gangways was about thirty-five feet. In front of the office, and in Stewart Street, and between the gangways, the defendants had piled three tiers of timbers, about twelve inches square. The ends of these timbers extended to the gangways, but they were so laid, one upon another, that the ends of some projected more than others. The plaintiff went to the defendants' office to purchase lumber, and started from the office with a clerk, to walk down Stewart street, alongside of the timbers to the gangway. While walking close to the timbers, one Randall drove a team from the yard through the gangway to the street, and, in doing so, the wheel caught the end of one of the timbers and threw it down. The plaintiff's leg sustained such an injury as to render amputation necessary. This action was brought to recover damages for the injury he thus sustained. There was an issue made in the pleadings as to whether the timbers were carelessly piled. The timbers had lain there for several months. The jury gave a verdict for the plaintiff for two thousand dollars damages, and the defendants appealed.

MCKINSTRY, J. If the timbers were negligently piled by the defendants, the negligence continued until they were thrown down, and (concurring with the action of Randall) was a direct and proximate cause of the injury sustained by the plaintiff.

Judgment affirmed.[1]

SOUTHERN RAILWAY CO. v. WEBB.

SUPREME COURT OF GEORGIA, 1902.

[*Reported* 116 *Mich.* 425.]

COBB, J. This was an action by the father of John W. Webb against the Southern Railway Company, for damages alleged to have been sustained by the plaintiff on account of the homicide of his son.

[1] See also Snydor v. Arnold, 122 Ky. 557, 92 S. W. 289. — ED.

The trial resulted in a verdict in favor of the plaintiff, and the defendant complains that the court erred in refusing to grant it a new trial.

1. The petition alleged that John W. Webb was a passenger on one of the trains of the defendant; that while in one of the cars of the train, in the exercise of all ordinary care and diligence, and just as he was about to take a seat near the rear door of the car, the train was negligently, suddenly, forcibly and with great violence jerked, jarred, and jolted, and as a result Webb was suddenly and without fault on his part thrown through the rear door of the car, and fell across the platform at the end of the car on to the track on a bridge over which the train was passing at the time the jolt took place; that he was stunned by the fall and rendered insensible; and that, while upon the track in a stunned, insensible, and injured condition and unable to walk or protect himself, he was negligently run over and killed by another engine passing along the track over the bridge. There was evidence authorizing the jury to find that Webb was a passenger upon a train of the defendant, and that while this train was going over a bridge a sudden and violent jolt occurred, sufficient to throw one from his feet who was standing in the train, and which had the effect of jostling the passengers and throwing down bundles from the racks of the car; that Webb was seen upon the train just before this jolt occurred, and he was then near the rear door of the car; that he was not seen afterwards by any one who was in the car; that shortly after the train upon which he was last seen had passed over the bridge, an engine belonging to the Georgia Railroad Company ran over and killed Webb, who was lying across the track on the bridge just at the point where the train was when the jolt occurred; that while the defendant had no control over this engine, the engines of the Georgia Railroad Company had a right to use this track, and it was known to the defendant that the engines of that company might pass along the track at any time when it was not otherwise in use. While the evidence was conflicting as to some of the points above referred to, there was ample evidence authorizing the jury to find all of the facts above stated. It is contended by the counsel for the plaintiff that from this evidence the jury could have inferred that Webb was thrown from the rear door of the car upon the track and was there in a stunned condition at the time the engine ran over him. Counsel for the railway company contends that the jury were not authorized to draw any such inferences, and that the plaintiff has failed to establish the case made in the petition; but that even if this position is not correct and the jury were authorized to infer, from the facts above referred to, that Webb was thrown from the inside of the car through the rear door of the same upon the track and stunned by the fall, still the plaintiff could not recover, for the reason that the negligence of the defendant which resulted in Webb's being hurled upon the track was not the proximate cause of his death, but that the immediate cause of his death was the intervention of another independent

agency, that is, the running of the engine of the Georgia Railroad Company upon the tracks at that point. As we have reached the conclusion, for reasons which will be hereafter stated, that the jury were authorized to infer, from the facts above detailed, that Webb was negligently thrown from the inside of the car through the rear door upon the track, it becomes necessary to determine whether this negligence on the part of the defendant was so far the proximate cause of the death of Webb that the defendant would be liable, notwithstanding the death was not actually brought about by the fall from the train, but by the running of the engine which ran over and killed him while he was lying in an insensible condition upon the track. See, in this connection, Hopkins' L. Pers. Inj. §§ 14, 15, 16. "No branch of the subject of personal injuries presents greater difficulty than the determination of liability for a specific loss, with reference to its naturalness and proximity as a consequence of the wrongful act complained of." Watson's Personal Injuries, § 25. As was said by Elbert, J., in Pullman Palace Car Co. *v.* Barker, 4 Colo. 344, "What is the proximate cause of an injury in a legal sense is often an embarrassing question, involved in metaphysical distinctions and subtleties difficult of satisfactory application in the varied and practical affairs of life." Chief Justice Shaw, in Marble *v.* Worcester, 4 Gray, 397, said: "The whole doctrine of causation, considered in itself metaphysically, is of profound difficulty, even if it may not be said of mystery." In Scott *v.* Hunter, 46 Penn. St. 195, Strong, J., said: "Indeed, it is impossible by any general rule to draw a line between those injurious causes of damage which the law regards as sufficiently proximate, and those which are too remote to be the foundation of an action." In Smith *v.* Telegraph Co., 83 Ky. 114, Judge Holt remarked: "The line between proximate and remote damages is exceedingly shadowy; so much so, that the one fades away into the other, rendering it often very difficult to determine whether there is such a connection between the wrong alleged and the resulting injury as to place them, in contemplation of law, in the relation of cause and effect." It has been said that notwithstanding the maze of doubt and difficulty with which this subject seems to be involved, still it is possible to take a more practical and simpler view than the observations of learned jurists would indicate; that the practical administration of justice prefers to disregard the intricacies of metaphysical distinctions and subtleties of causation, and to hold that the injury as to natural and proximate cause and consequence is to be answered in accordance with common sense and common understanding. Watson's Pers. Inj. § 28. From the author just cited we quote the following:

"A natural consequence is one which has followed from the original act complained of, in the usual, ordinary, and experienced course of events. A result, therefore, which might reasonably have been anticipated or expected. Natural consequences, however, do not nec-

essarily include all such as upon a calculation of chances would be found possible of occurrence, or such as extreme prudence might anticipate, but only those which ensue from the original act without any such extraordinary coincidence or conjunction of circumstances as that the usual course of nature should seem to have been departed from." § 33.

"From the very outset, the practical distinction between causes and consequences should be borne in mind in this particular: a consequence of an original cause may, in turn, become the cause of succeeding consequences. But such a cause should not, manifestly, be regarded as an intervening cause which will relieve from liability the author of the original cause, but rather as only a consequence along with the other consequences. A tortious act may have several consequences, concurrent or successive, for all of which the first tort-feasor is responsible. It is not intervening *consequences*, but intervening *causes* which relieve. The test is to be found, it has been said, not in the number of intervening events or agents, but in their character and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the original wrong as a result which might reasonably have been foreseen as probable, legal liability continues." § 58.

"Some authorities have formulated rules on this subject designed for general application, as that the defendant is not responsible where there has intervened the wilful wrong of a third person, or is liable where such act is of a negligent character merely. But the better doctrine is believed to be that whether or not the intervening act of a third person will render the earlier act too remote depends, simply, upon whether the concurrence of such intervening act might reasonably have been anticipated by the defendant." § 71.

In Pittsburgh Railway Co. *v.* Taylor, 104 Penn. St. 315, Mr. Justice Paxson said: "In determining what is proximate cause the true rule is, that the injury must be the natural and probable consequence of the negligence, such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act." In Lane *v.* Atlantic Works, 111 Mass. 139, Colt, J., said: "The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise." In Seale *v.* Ry. Co., 65 Tex. 278, Chief Justice Willie said: "What character of intervening act will break the causal connection between the original wrongful act and the

subsequent injury is also left in doubt by the decisions. If the intervening cause and its probable or reasonable consequences be such as could reasonably have been anticipated by the original wrongdoer, the current of authority seems to be that the connection is not broken." See also Col. Mtg. Co. *v.* Rees (Col.), 42 Pac. 42, 45; 21 Am. & Eng. Enc. L. (2d ed.) 486 *et seq.*

Treating it as established in the present case that Webb was upon the track of the defendant in an insensible condition as a result of the negligence of the defendant, is it reasonable or unreasonable to hold that the defendant should have apprehended that a person in this condition, in such a place, might be injured or killed by the running of an engine upon the track? Was the defendant bound to anticipate that injury or death might result to a person in such a condition in such a place? The track was under the control of the defendant; and if Webb had been killed by an engine of the defendant which came along the track after the train from which Webb was thrown had passed, the defendant would have been liable, although the employees in charge of the engine had been wholly free from negligence. South Carolina Railroad Company *v.* Nix, 68 Ga. 572. In that case Mr. Chief Justice Jackson said: "Suppose there had been a prosecution for murder, who would be found guilty thereof, the conductor of the train who did the deed of throwing him off and under, or the conductor of the other train who ran unconsciously over him? Clearly he who did the intentionally wrongful act, and whose act caused his death." The principle upon which the ruling in the Nix case is founded is that a railway company is bound to know that its tracks may be used at any time by the engines and trains of the company, and is bound to anticipate and apprehend any consequence that may result to one who, on account of its negligence, is left in a condition in which and in a place where he is liable to be injured by the running of such trains. If a railway company is bound to anticipate and apprehend that one left in a helpless condition in a perilous place upon its tracks through its negligence may be injured by one of its own engines or trains running thereon, is it not equally bound to so anticipate and apprehend any injury which might result to such a person from an engine of another company which the first company knew had a right to and did actually use the tracks from time to time? It would indeed bring about a curious result if the defendant would be liable in such a case only when the second engine or train was owned by it. It must be kept in mind that in such cases no negligence is claimed against the persons in charge of the second train or engine. They are blameless. If there is any liability, it results from the negligence of those in charge of the train which left the person killed in a perilous situation upon the track. It would seem that ownership of the second engine or train would be entirely immaterial, and the only question to be considered would be whether the first company knew, or ought to have known, that the second engine or train, no

matter by whom owned, had a right to or did actually from time to time use the track at the place at which the person was killed.

When a railway company negligently leaves a person upon its track in a helpless condition, it will certainly be held liable for any injurious consequences which may result to such a person growing out of the running of trains along the track, without regarding the ownership of such trains, if the company knew or ought to have apprehended that the trains would pass along the track at that point. The present case is very similar to the case of Byrne *v.* Wilson, 15 Ir. Com. Law Rep. 332. That was a case brought in 1862, under Lord Campbell's act, by William Byrne, as administrator of Mary Byrne, against a person who was alleged to be the proprietor of certain omnibuses and as such engaged in the business of a common carrier of passengers. Mary Byrne was a passenger in one of the omnibuses, and through the negligence of the servants of the defendant the omnibus was precipitated into the lock of a canal, and Mary Byrne was there in an insensible condition, when the keeper of the lock turned the water therein, and she was drowned. It was held that although the death of Mary Byrne was not caused immediately by the act of the defendant, it was such a consequential result of that act as entitled her representative to maintain an action. Lefroy, Chief Justice, said (p. 340): "It was not the negligence of the defendant that was the immediate occasion of her death but it was the negligence of the defendant that put her into a position by which she lost her life, as a consequential injury resulting from that negligence; and although that death was not caused immediately by the act of the defendant, nor was the immediate and instantaneous result of his negligence, yet it was the consequential result of the defendant's act, and enables her representative to maintain this action." The defendant knew that the Georgia Railroad Company had a right to use these tracks. It also knew that it might use them at any time. When, therefore, Webb was negligently thrown upon the tracks and left there in a helpless condition, the defendant was bound to apprehend and anticipate that injurious consequences would likely result to him from the use of the track by the servants and agents of the Georgia Railroad Company in charge of its engines and trains. This being so, the negligence of the defendant which resulted in leaving Webb helpless upon its tracks was in law the proximate cause of his death, notwithstanding his death was actually brought about by another agency.

We do not think this ruling is in conflict with any of the cases cited in the brief of counsel for the plaintiff in error. In Perry *v.* Railroad Co., 66 Ga. 746, the plaintiff had deposited his luggage in a car of the defendant, intending to go upon the train as a passenger, and left the car and engaged in conversation with another person in the depot. While so engaged his attention was called to the fact that the train had moved off and he ran until he reached the end of the car-shed. While passing through the gateway of the car-shed he came in con-

tact with the engine of another company, which was coming into the shed, and as a consequence received serious injuries. It was held that the negligence of the railroad company in starting its train without giving a signal was not the proximate cause of the injury which the plaintiff subsequently received by running against the engine of another train in his effort to catch the defendant's train. The defendant could not have foreseen, nor was it bound to anticipate or apprehend, that, as a result of its negligence in starting its train without a signal, a passenger would, in attempting to catch the train, run against the engine of another train and receive serious injuries. In the case of Mayor *v.* Dykes, 103 Ga. 847, a street-car company had negligently constructed its track so that the rails were above the surface of the street. The plaintiff, while driving a horse attached to a two-wheel road-cart, attempted to drive across the track at an angle of about forty-five degrees; the wheels of his cart came in contact with the iron rails of the track, slipped along the track and made a scraping noise, which caused the horse to take fright and run away. The cart collided with a wagon, and plaintiff was thrown to the ground and seriously injured. Although the street-car company may have been negligent in the way it constructed its track, it certainly could not have foreseen that as a result of this negligence a scraping noise would be made, and that this noise would frighten a horse and the horse would run away, and the vehicle to which he was hitched would collide with a wagon and the plaintiff would as a result be injured. Of course, if the car had been overturned as a result of the tracks being built too high above the surface of the street, and injury had resulted from an accident of this character, the case would have been different.

In Central Ry. Co. *v.* Price, 106 Ga. 176, the plaintiff was a passenger who had been carried wrongfully beyond her station and when this fact was discovered she was requested to alight at another station, which she did, and was carried to a hotel by the conductor. While at the hotel a lamp in her room exploded and as a consequence she sustained damage. It was held that the railway company was not liable for the injury thus sustained. The defendant could not have foreseen, apprehended, or anticipated that the plaintiff would suffer injuries of the character received by her at the hotel; and hence its negligent act in carrying her beyond her station could not be said to be the proximate cause of the injuries thus received. In Central Ry. Co. *v.* Edwards, 111 Ga. 528, the plaintiff was a brakeman on a freight-train, and was ordered by the conductor to jump off the train for the purpose of changing the switch. In obedience to this order the plaintiff jumped from the car on which he was standing, and being unable to see the ground beneath him, his right foot was caught in a frog of the switch, the frog not having been blocked so as to prevent such an accident, and the wheels of the car ran over and crushed his foot. The distinction between that case and the present will be apparent when the following language of

Mr. Justice Little in the opinion in that case is considered: "The direct and proximate cause of the injury which the plaintiff sustained was his jumping from the train; and if he is entitled to recover damages from the defendant company therefor, it is because of some negligence on the part of said company which caused the jump from which the injury resulted, or negligence in not protecting the place where in fact he did jump. As we have seen, it is not charged in the petition that the railroad company was, through its conductor, negligent in directing the plaintiff to jump from the car at the time he did." It was held that the failure to block the switch was not an act of negligence.[1]

LOWERY v. MANHATTAN RAILWAY CO.

COURT OF APPEALS OF NEW YORK, 1885.

[*Reported* 99 *N. Y.* 158.]

MILLER, J. The principal question arising upon this appeal relates to the right of the plaintiff to recover for the injuries sustained.

The claim of the defendant is, that the cause of the injury was too remote to authorize a recovery of any damages whatever, and it is urged that the court erred in denying the motion to dismiss the complaint, made by the defendant's counsel on the ground stated, as well as in the charge to the jury, that if they believed "that the coal and ashes fell from the defendant's locomotive, through any negligence on the part of the defendant, its servants or agents, and falling upon the horse, caused him to become unmanageable and run against the plaintiff, inflicting injuries upon him, then the defendant is liable to the plaintiff for his damages, occasioned thereby." The same question was also raised by the defendant's counsel by a request to the judge to charge, that "if the jury believed the accident occurred through the driver's error of judgment in endeavoring to obtain control of his horse, the plaintiff cannot recover," which was refused and an exception duly taken to the decision.

It is urged by the appellant's counsel that where there is an intermediary agent or medium between the primary cause of the injury and the ultimate result, the rule of law to be applied is that, where the original act complained of was not voluntary or intentional, or one of affirmative illegality, or in itself the cause of criminal complaint, but was caused by negligence, the responsibility is limited to the necessary and natural consequences of the act, and that when beyond that, they are or may be modified or shaped by other causes, they are too remote to be the foundation of legal accountability.

[1] The remainder of the opinion discusses other questions.

See Fine *v.* Interurban St. Ry., 45 N. Y. Misc. 587, 91 N. Y. S. 43; Kraut *v.* Frankford & S. P. C. P. Ry., 160 Pa. 327, 28 Atl. 783. — ED.

The injury sustained by the plaintiff was caused by reason of fire falling from a locomotive of the defendant upon a horse attached to a wagon, in the street below and upon the hand of the driver. The horse became frightened and ran away and the driver attempted to guide his movements and drive him against a post of the elevated railroad so as to stop him. Failing to accomplish this he intentionally turned the horse and attempted to run him against the curbstone to make it heavy for him and so arrest his progress, but the wagon passed over the curbstone instead of being arrested by it and threw the driver out and ran over and injured the plaintiff.

It will be seen that the injury was not caused directly by the defendant, but was produced through the instrumentality of the horse and driver, the latter of whom, it appears, was doing all that lay in his power and exercising his best judgment in attempting to stop the frightened animal and to prevent any further injury, and the question we are called upon to consider here is, whether, in view of the fact that the plaintiff may have been injured by reason of the management of the horse by the driver, in consequence of which it was diverted from the natural course it might otherwise have taken, the defendant is relieved from responsibility for the result of the accident.

It may be assumed that at that time the driver, who was smarting from the effects of the burning coal which had fallen upon his hands, and startled by the suddenness of the accident, may have been somewhat disconcerted by the peril in which he was placed and, therefore, was unable to manage and control the infuriated animal as he might otherwise have done. The law, however, makes allowances for mistakes and for errors of judgment which are likely to happen upon such an emergency. It does not demand the same coolness and self-possession which are required when there is no occasion for alarm or a loss of self-control.

Where a person is traveling upon a train of cars and a collision has taken place or is likely to occur, and he, under the excitement of the moment, jumps from the train and thereby increases his own danger and chances of injury, although the act of attempting to escape is very hazardous and negligent, yet it is an instinctive act which naturally would take place when a person seeks to avoid great peril, and though wrong in itself, that fact does not relieve the company from liability, if its negligent conduct and a sense of impending danger induced the act.

In the case under consideration, the driver was passing along in pursuit of his customary business driving his horse, when suddenly the falling of the fire upon himself and the horse placed him in a position of great danger, and he was justified in attempting to save his own life and protect himself from injury. If he made a mistake in his judgment, the company was not relieved from liability. If he had allowed the horse to continue on in its own way, it is by no means clear that a

similar, if not greater injury might not have been inflicted upon some other person than the plaintiff. It is impossible to determine what the result might have been in such a case, and, therefore, it is indulging in speculation to say that the driver's act, under the circumstances, was not the best thing that could have been done. In such cases, it is difficult to disconnect the final injury from the primary cause, and say that the damages accruing are not the natural and necessary result of the original wrongful act. The defendant was chargeable with an unlawful act, which inflicted an injury upon the driver and the horse in the first instance, and ultimately caused the injury sustained by the plaintiff. The injury originally inflicted was in the nature of a trespass, and the result which followed was the natural consequence of the act. So long as the injury was chargeable to the original wrongful act of the defendant, it is not apparent, in view of the facts, how it can avoid responsibility. There was no such intervening human agency as would authorize the conclusion that it was the cause of the accident and therefore it cannot be said that the damages were too remote.

The company would clearly be liable for any direct injury arising from the falling of the burning coals upon the horse if it had been left to pursue its own course uncontrolled by the driver, and there would seem to be no reason why it would not be equally liable where the driver seeks to control the horse and exercises his best judgment in endeavoring to prevent injury. That he failed to do so for want of strength or by reason of an error of judgment does not prevent the application of the principle which controls in such a case.

It may, we think, be assumed that such an accident might occur in a crowded street where conveyances are constantly passing, and that the driver of the horse, who might possibly be injured by the defendant's unlawful act, would seek to guide the animal, and if possible, prevent unnecessary injury. The action of the driver, in view of the exigency of the occasion, whether prudent or otherwise, may well be considered as a continuation of the original act, which was caused by the negligence of the defendant, and the defendant was liable as much as it would have been if the horse had been permitted to proceed without any control whatever. We think that the damages sustained by the plaintiff were not too remote, and that the wrongful act of the defendant, in allowing the coals to escape from the locomotive, thus causing the horse to become frightened and run, was the proximate cause of the injury, and that the running away of the horse and the collision with the plaintiff were the natural and probable consequences of the negligence of the defendant.

These views are fully sustained by the decisions of the courts. (Scott *v.* Shepherd, 2 W. Black. 892; Lynch *v.* Nurdin, 1 Ad. & El. [N. S.] 29; Former *v.* Geldmecher, 13 Rep. 790; Vaughn *v.* Menlove, 32 Eng. C. L. 613; Guille *v.* Swan, 19 Johns. 381; Thomas *v.* Winchester, 6 N. Y. 397; Vandenburgh *v.* Truax, 4 Denio, 464; Webb *v.* R., W. &

O. R. R. Co., 49 N. Y. 420; Pollett *v.* Long, 56 id. 200; Putnam *v.* B'd'y, etc., R. R. Co., 55 id. 108.) We do not deem it necessary to examine these cases in detail, and while it may be said that in some of them the injury was caused by the positive, unlawful act of the defendant at the beginning, in others the original act was lawful, while the consequence which followed resulted from the subsequent interference with the plaintiff's rights. In Guille *v.* Swan (19 Johns. 381, *supra*), the act of setting up the balloon was lawful in itself, and the injury which followed was the result of its falling on the premises of the plaintiff in a city, and attracting the attention of people outside, and thus causing the damages incurred. In the case at bar the falling of the coals on the horse and driver was caused by the negligence of the defendants' servants, but it was, nevertheless, a direct invasion of the rights of the property and person of the driver and the owner of the horse and wagon, and produced the injury to the plaintiff the same as the falling of the balloon on the plaintiff's premises in the case last cited. We are unable to perceive any distinction between the two cases which would justify the conclusion that the damages to the plaintiff here were more remote than those which were incurred in the case last cited. The principle which is applicable to both cases is the same; it is not apparent that any distinction can be drawn between them which would relieve the defendant from responsibility. It is enough to charge the defendant that it was the author and originator of the wrongful act which produced the injury and hence it is liable for the same as one of the natural consequences arising from the act itself. It is difficult to conceive any valid ground upon which it can be claimed that the effect of the defendant's negligence was not a probable and the natural consequence following the same.

We are referred to numerous cases cited by the appellant's counsel which, it is claimed, sustain the doctrine contended for by him, and great reliance is placed upon the case of Ryan *v.* N. Y. C. R. R. Co. (35 N. Y. 210), which was followed and sustained in Penn. R. R. Co. *v.* Kerr (62 Penn. St. 353). In the Ryan case the court defined remote damages to be those which are not an ordinary and natural, not an expected, not a necessary and usual result of the negligent act. It appeared in that case that the fire was communicated first to the defendant's building from a locomotive on its road, and then over a space of one hundred and thirty feet to the building of the plaintiff, and it was held that the defendant was not liable for the reason that it was not to be anticipated that the fire would be communicated to premises not contiguous. This is far different from a case where a direct injury is inflicted upon a person and property; as in the case at bar it was inflicted in a populous city upon a horse and driver, and caused the horse to become frightened and run away, and it can scarcely be claimed that the consequence which ensued was not the probable and direct cause of the injury sustained.

The two cases last cited were considered and reviewed by Folger, J., in Webb *v.* R. W. & O. R. R. Co. (49 N. Y. 420, *supra*). In that case the fire was communicated by live coals dropped from the engine and setting fire to a tie on the track, which spreading to an old tie by the side of the track, and from that to some rubbish, and then to the fence along the track, and then to plaintiff's woodland, did the damage complained of, and it was held that the defendant was liable for the injury. It is laid down in the opinion that the Ryan case held that the action in that case could not be sustained for the reason that the damages incurred by the plaintiff were not the immediate but the remote result of the negligence of the defendant, and it was stated that this was not a new rule. Folger, J., says in regard to that case, "The pith of the decision is that this was a result which was not necessarily to be anticipated from the fact of the firing of the wood-shed and its contents; that it was not an ordinary, natural and usual result from such a cause; but one dependent upon the degree of heat, the state of the atmosphere, the condition and materials of the adjoining structures and the direction of the wind, which are said to be circumstances accidental and varying. The principle applied was the converse of that enforced in Vandenburgh *v.* Truax (4 Denio, 464), which was that the consequence complained of was the natural and direct result of the act of the defendant. This principle is said in the Ryan case not to be inconsistent with that which controlled the disposition of the latter case, and to be unquestionably sound, but should be applied according to sound judgment in each case as it arises." After referring to the Pennsylvania decision the learned judge concludes that the Ryan case was not controlling in the disposition of the case considered more than the long line of decisions which preceded it.

It will be observed that the Ryan case is clearly distinguishable from the case at bar and can scarcely be held to be applicable to the facts presented here and was not followed in the case last cited, although there was considerable similarity in the leading facts between the two cases. It certainly should not be held to be controlling where there was a positive and unlawful act of the defendant which, as we have seen, induced the accident which was the cause of the plaintiff's injury. Nor have the courts of this State since the decision of Ryan *v.* N. Y. C., etc. (*supra*), held that it established any new or different rule than the one which has long existed and which has been settled by repeated adjudications, as will be seen by the citations already made.

In Pollett *v.* Long (56 N. Y. 200) it was held that where an injury to one is caused by and is the natural and probable result of the wrongful act or omission of another, such other is liable therefor although other causes, put in motion by the act or omission, and which in the absence thereof would not have produced the result, contribute to the injury. It appeared in this case that the defendant's dam had given away and carried away a dam of the plaintiff, and by increasing

the volume of water tore out the dam of a third party, of whom plaintiff was assignee, and the court charged, in substance, that defendant's negligence must have been the sole cause of the injury or there could be no recovery; that although defendant's dam was defective and out of repair, and in consequence gave way, if there was sufficient water in the middle pond when its dam gave way to materially increase the volume and force of the stream, then plaintiff could not recover for injuries to the lower dam, as the damages would be too remote. This was held error. Grover, J., in his opinion, after stating that Ryan *v.* N. Y. C. R. R. Co. and Penn. R. R. Co. *v.* Kerr (*supra*) were cited in support of the charge, and after discussing the Ryan case, says: "Assuming that this rule was correctly applied in the case of Ryan *v.* New York Central, . . . it comes far short of sustaining the proposition under consideration." It will be seen that the Ryan case is clearly distinguishable from the case at bar.

We have carefully examined the other cases in this State which are cited and relied on by the appellant's counsel, and none of them hold that no responsibility exists where the evidence establishes an act of the defendant which was the cause of injury to a third person, although that injury may have been occasioned by the intermediate agency and through the instrumentality of a party who in the first instance was the direct object from which sprang the final result which was the cause of the damages claimed. We think that no such case can be found in the reports. The decisions which are relied upon from other States do not present a state of facts which can be regarded as entirely analogous to the case at bar; and even if any of them may be considered as leaning in the direction claimed, in view of the fact that the decisions in this State are to the contrary, they are not decisive of the question considered. There was sufficient evidence of the defendant's negligence to submit the case to the consideration of the jury as was done.

There was no error in the charge of the judge, or refusals to charge as requested, or in any ruling on the trial.

The judgment was right and should be affirmed.

All concur, except RAPALLO, J., dissenting, and EARL, J., not voting.

Judgment affirmed.[1]

MINER, READ & GARRETTE *v.* McNAMARA.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1909.

[*Reported* 81 *Conn.* 690.]

ACTION to recover for the loss of a stock of merchandise due to the collapse and fall of a leased building, and alleged to have been caused by the defendants' negligence, brought to and tried by the Superior

[1] See also Pratt *v.* Chicago R. I. & P. Ry., 107 Ia. 287, 77 N. W. 1064; Drommie *v.* Hogan, 153 Mass. 29, 26 N. E. 237. — ED.

Court in New Haven County, Robinson, J., upon a demurrer to the complaint filed by one of the defendants; the court sustained the demurrer and rendered judgment for that defendant, from which the plaintiff appealed. No error.

The complaint alleges, in substance, the following facts: The defendant McNamara, on May 1st, 1907, leased to the plaintiffs for the term of five years, for the general purpose of a warehouse in their business as wholesale grocers, a four-story brick building known as No. 44–46 Union Street, Bridgeport. About a month after the plaintiffs had taken possession, and when they had merchandise valued at upward of $14,000 stored therein, the building collapsed and fell, thereby destroying the plaintiffs' property.

McNamara, through his agents and servants, his co-defendants in this action, had erected the building a short time previous to leasing it to the plaintiffs. Before its construction he had filed with the board of building commissioners of the city of Bridgeport, in accordance with one of its ordinances, a clear statement in writing of the proposed building, together with a copy of the plans and specifications of the same, and had obtained from that board a permit authorizing him to construct the building in accordance with those plans and specifications. No other statement or copy of plans was ever filed by him with the board, and no permit, special or otherwise, was ever issued by the board permitting any change in the plans and specifications of the building. McNamara and his co-defendants in erecting the building departed from the plans and specifications, in that the building erected was four stories in height instead of three stories, as therein specified, and the walls were substantially less in thickness, and the supporting piers less in number and smaller in dimension, than those provided for in the plans and specifications. The walls, as constructed, also violated an ordinance of the city of Bridgeport designating the thickness of walls in buildings of the height and plan of construction of this one, when situated, as this was, within the fire limits of the city. The defendant The S. W. Hubbell Building Company did the carpenter work in said building, and was negligent in the performance of it, in that the timber used was unsound, insufficient in size and strength, and not of proper quality to be used in the construction of a building of its character, and unfit for the support of the floors, walls and ceilings thereof, and in that the floors, walls and ceilings were not properly supported, braced and strengthened so as to bear such reasonable weight as is customarily put upon the floors, walls and ceilings of buildings of similar construction, and such strain as said Building Company knew would, in the ordinary course, be put upon the floors, walls and ceilings of the building.

The defendant McNamara, at the time he leased the building to the plaintiffs, knew that in the construction of the building the city ordinance had been violated as above stated, that the building did not con-

form to the plans and specifications which he filed with the board of building commissioners, that the carpenter work, mason, stone, brick and iron work, had been negligently and improperly done, that the materials were of improper and inferior quality, and the walls, floors, ceilings, roof and supports thereof were weak and insufficient, and that the whole building was in a dangerous, ruinous and dilapidated condition and likely to fall and collapse if the building were in any way used or any strain or weight put upon the floors, walls or ceilings thereof. None of these facts were known to the plaintiffs or any of them, and could not be discovered by an ordinary inspection or by any inspection which the plaintiffs or any of them were capable of making. The collapse and fall of the building were due entirely to the neglect of the several defendants as above set forth, to the improper and inferior materials used in said construction, and to the negligent, improper, unsafe and unlawful plan and manner in which the work was done.

The defendant The S. W. Hubbell Building Company demurred to the complaint, assigning as reasons that there was no privity between it and the plaintiffs, its contract having been with the owner of the land and its work done long before the plaintiffs leased the building; that there was no causal connection between its negligence and the plaintiffs' injury; and that it had made no representation to the plaintiffs that the building was safe, had no contractual or other relations with them, and had no occupation of said building or control over it or duty toward it at the time of the accident and for a long time prior thereto.

THAYER, J. Whether this defendant (The Hubbell Building Company) is liable for the plaintiff's injury, depends upon whether its negligent or unlawful act was the proximate cause of that injury. "That only is a proximate cause of an event, juridically considered, which, in a natural sequence, unbroken by any new and intervening cause, produces that event, and without which that event would not have occurred." Smith *v.* Connecticut Ry. & Ltg. Co., 80 Conn. 268, 270, 67 Atl. 888. The last conscious agent in producing the injury is the party liable for it. 1 Beven on Neg. in Law (3d ed.) 53. The law does not search for the more remote agencies by which the injury was brought about or made possible.

It appears from the complaint that the owner of the building, after it was completed and when this defendant had nothing further to do with it, with full knowledge that it did not conform to the plans and specifications and to the requirements of the city ordinance, that the workmanship and materials were poor, and that the building was weak and dangerous and likely to collapse and fall if it were in any way used or any strain put upon its floors or walls, leased it to the plaintiffs, by whom the facts were not known nor discoverable by ordinary inspection or by any inspection which they were capable of making.

The tenant ordinarily takes the risk as to the condition of the premises which he leases. Gallagher *v.* Button, 73 Conn. 172, 175, 46 Atl. 819.

But when there are secret structural defects in the premises which render them dangerous for occupancy, known to the lessor but unknown to and undiscoverable by the lessee by careful inspection, the law imposes a duty upon the lessor to make such condition known to the tenant; and failure to do so is negligence on his part which makes him liable for any injury which results to the tenant from such defective and dangerous condition. Cowen v. Sunderland, 145 Mass. 363, 364, 14 N. E. 117; Booth v. Merriam, 155 Mass. 521, 522, 30 N. E. 85; McKenzie v. Cheetham, 83 Me. 543, 549, 22 Atl. 469; Scott v. Simons, 54 N. H. 426, 431; Gallagher v. Button, 73 Conn. 172, 46 Atl. 819. This is precisely the case presented by the complaint, as between the plaintiffs and McNamara, the owner of the building. His negligence was the proximate cause of their injury, upon the allegations. That injury cannot be attributed to this defendant's negligence in failing to construct a proper building. Its dangerous condition may have been due, in whole or in part, to this defendant's negligence, but that negligence was not the proximate cause of the plaintiffs' injury, because a new conscious agent, knowing of the existence of that condition, intervened, and instead of so acting as to prevent the injury acted so negligently as to cause it.

Nor can it be said that, omitting the allegation that the owner neglected to disclose to the plaintiffs the dangerous condition of the property, a good cause of action against this defendant is stated in the complaint. If he made such disclosure, the plaintiffs could not recover against him, because, in that case, they accepted their term and occupied the property at their own risk. It would be strange if, in such a case, they could recover against his servant, who under his direction had used improper materials and otherwise taken part in the improper construction. The same reason which would prevent their recovery against the owner — their own intervening negligence — would prevent their recovery against the defendant.

It is not alleged or claimed that the owner was ignorant of the manner in which the building was constructed; on the contrary, it is alleged in the complaint and was insisted on in the brief and argument in behalf of the plaintiffs, that he caused it to be so constructed by his agents and servants and had full knowledge of its condition.

Whether the negligence complained of was the violation of a duty imposed by the common law or of one imposed by the city ordinance, that negligence must have been the proximate cause of the plaintiffs' injury to warrant a recovery. There is no ground for distinction between the two. Broschart v. Tuttle, 59 Conn. 1, 20, 21 Atl. 925. In neither case can the plaintiffs recover, for the reasons already stated. It is unnecessary, therefore, to consider whether the present defendant's violation of the ordinance could in any case create a cause of action in favor of a party injured in consequence of such violation.

The complaint shows that there was no causal connection between

the negligence of this defendant and the injury of the plaintiffs, and the demurrer was therefore properly sustained.

There is no error.

In this opinion the other judges concurred.[1]

FOWLES v. BRIGGS.

SUPREME COURT OF MICHIGAN, 1898.

[*Reported* 116 *Mich.* 425.]

MONTGOMERY, J. Alexander T. Fowles, plaintiff's intestate, on the 4th day of February, 1896, was an employee of the Flint & Père Marquette Railroad Company. His employment was that of rear brakeman on a freight train. The defendants, lumber dealers, loaded a flat car with lumber, in their yard in the city of Saginaw, and shipped it over the Flint & Père Marquette Railroad Company, to Toledo, Ohio. The lumber was maple, 11,000 feet, weighing about 33,000 pounds, and piled flat upon the car in two tiers parallel with the sides of the car. It was put upon this flat car by the defendants three days before the day of the accident. The testimony of the plaintiff tended to show that the railroad crew, of whom the deceased was rear brakeman, were ordered by the railroad company, on the morning of the 4th of February, to make up some freight trains for transportation; and, in the line of their duty, this car load of lumber was shunted at a rate not to exceed from three to five miles an hour upon a level track towards a box car. The deceased was upon the ground, and stepped in between the box car and the car load of lumber for the purpose of coupling the two; and, when the car of lumber came in contact with the box car, the lumber shifted 25 inches upon the surface of the flat car, and crushed to death the deceased, by pinning him against the end of the box car.

The plaintiff's declaration declares the several acts of negligence of the defendants to be:

1. That they carelessly and recklessly loaded said flat car of said railroad company so as to cause the death of the deceased by the shifting of the lumber while upon said car; that said lumber was so loaded upon said car that it was not safe for an employee of said railroad company to couple it to another car, and that said danger was not apparent to the deceased.

2. That it was the duty of said defendants not to ship maple lumber upon a flat car without having the lumber so fastened and staked as to hold it from shifting.

[1] See also Parsan v. New York Breweries Co., 208 N. Y. 337, 101 N. E. 879.— ED.

3. That a piece of timber or other material should have been placed crosswise upon the floor and near the ends of said flat car, under the lumber, for the purpose of elevating the extreme ends of the lumber.

4. That the defendants loaded this lumber upon the deck of said car while the deck was covered with ice and snow and sleet, and in a slippery condition.

5. That the lumber was covered with ice and snow and sleet, and in a slippery condition.

6. That the lumber should have been placed in a box car, and not upon a flat car.

The cause was tried before a jury, and, after the proofs were all in, the trial judge said to the jury that "the evidence fails to show that the defendants violated any legal duty that they owed the deceased. Consequently there is no question of fact to be submitted to you for your consideration. Your verdict, therefore, will be in favor of the defendants of no cause of action."

The deceased had no contract relations with the defendants, and, if his representative has a right of action based upon defendants' negligence, it must rest upon a duty owed to deceased in common with all other employees of the Flint & Père Marquette Railroad Company, or other road over which the car in question might ultimately be shipped; in short, a breach of a duty owing to the public. An accurate statement of this duty is:

"If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of his negligence." Whart. Neg. § 437.

Yet, as stated by the same author, the consequence must be immediate, or the action fails. In other words, there must be causal connection between the negligence and the hurt, and such causal connection is interrupted by the interposition between the negligence and the hurt of an independent human agency. Id. § 438. In the present case the defendants owed the railroad company the duty of using ordinary care in loading the car in question; but, before the car came to decedent, it was the duty of the railroad company to provide for the inspection. Here was the intervention of an independent human agency. A leading case is Winterbottom *v.* Wright, 10 Mees. & W. 109, in which case it was held that the defendant, who had contracted with the postmaster general to provide a mail coach, and keep it in repair, was not liable to an employee of one Atkinson, who had contracted with the postmaster general to provide horses and coachmen for the purpose of carrying the mail. See, also, Losee *v.* Clute, 51 N. Y. 494 (10 Am. Rep. 638); Goodlander Mill Co. *v.* Standard Oil Co., 11 C. C. A. 253, 63 Fed. 400; Loop *v.* Litchfield, 42 N. Y. 351 (1 Am. Rep. 543); Roddy

v. Railway Co. 104 Mo. 234 (24 Am. St. Rep. 333). In Necker *v.* Harvey, 49 Mich. 519, the leading cases on this point are cited with approval by Mr. Justice Cooley.

Plaintiff seeks to bring this case within a line of cases cited creating an apparent exception to the rule stated; but we think these cases may be all classed as coming under one of three heads: *First*, as in Johnson *v.* Spear, 76 Mich. 139 (15 Am. St. Rep. 298), where the fault was not keeping defendant's premises in a suitable and safe condition; or, second, as in Roddy *v.* Railway Co., *supra*, where the defendant reserves the right to direct the manner of work, or undertakes to supply the instrumentalities. Of this class is also Elliott *v.* Hall, 15 Q. B. Div. 315, relied upon by plaintiff, in which case it was said by the court that "the defendant had entire dominion over the truck" which caused the injury,— a fact which distinguishes the case from the present. Cases belonging to a *third* class, more closely analogous to the case under consideration, have arisen where the shipper of a dangerous substance, the character of which is not made known to the carrier, has been held liable. But liability in this class of cases has been limited to instruments and articles in their nature calculated to do injury. Davidson *v.* Nichols, 11 Allen, 514. We think the case of Chapman *v.* Atlantic Refining Co., 38 Hun, 637, and 108 N. Y. 638, which counsel for plaintiff cite as fully sustaining their contention, is clearly distinguishable from the present case. The statement of facts in that case is found in New York, etc., R. Co. *v.* Atlantic Refining Co., 129 N. Y. 598, from which it appears that the defendant corporation was engaged in constructing some oil tanks on the line of the New York, Lake Erie & Western Railroad Company, at a place called Dykes' Switch. The employees of defendant left a car of lumber, *after it had been delivered to defendant*, and partly unloaded, in such unsafe condition that a portion of the lumber fell upon or was blown upon the track of the railroad company, causing the derailment of the engine operated by the plaintiff, Chapman. It will be seen that the defendant had complete control over the partly-unloaded car, and whatever duty was owing was owing by defendant. In the present case the defendants had parted with the control of the car. The railroad company owed the duty to decedent of causing an inspection or of providing a rule for inspection.

We think the circuit judge was right in his holding.

Judgment affirmed.

The other Justices concurred.[1]

[1] See also Texas & P. Ry. *v.* Carlin, 111 Fed. 777; Kiser *v.* Suppe, (Mo. App.) 112 S. W. 1005; Pittsfield C. M. Co. *v.* Pittsfield Shoe Co., 72 N. H. 546, 58 Atl. 242. — Ed.

CHAPTER IV.

LIABILITY IRRESPECTIVE OF PROXIMATE CAUSATION.

SECTION I.

Respondeat Superior.

HERN v. NICHOLS.

NISI PRIUS. 17—.

[*Reported* 1 *Salk.* 289.]

IN an action on the case for a deceit, the plaintiff set forth, that he bought several parcels of silk for —— silk, whereas it was another kind of silk; and that the defendant, well knowing this deceit, sold it him for —— silk. On trial, upon not guilty, it appeared that there was no actual deceit in the defendant who was the merchant, but that it was his factor beyond sea: And the doubt was, If this deceit could charge the merchant? And *Holt*, C. J., was of opinion that the merchant was answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter;* for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger: And upon this opinion the plaintiff had a verdict.

LOCKE v. STEARNS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1840.

[*Reported* 1 *Met.* 560.]

TRESPASS upon the case in the nature of deceit. The declaration alleged that the defendants fraudulently sold to the plaintiff divers quantities of meal, as and for linseed meal, which was in fact a mixture of linseed meal and teelseed meal; the latter being of a quality inferior to the former, and of less value. The action was commenced against G. L. Stearns, H. L. Stearns, and G. C. Hall, but the writ was not served on Hall.

At the trial in the court of common pleas, before *Strong*, J., it was proved or admitted, that the three persons above mentioned were in partnership in the business of manufacturing oil from linseed, at their factory in Medford; that the selling of linseed meal was within the regular business of said partnership; that the meal mentioned in the plaintiff's declaration was sold to him as hereinafter stated; and that, at the time of the sale thereof, L. Richardson was the foreman of the defendants in their said factory.

It was in evidence that teelseed was recently introduced into this country, and that the defendants began to use it in the making of oil, as a substitute for linseed, in the latter part of the year 1837; and that they, or some of them, began to mix the teelseed meal with the linseed meal, about the middle of January, 1838: That said Richardson, about that time, was directed by G. L. Stearns, to mix the two kinds of meal, and that H. L. Stearns had said that "they put in one half teelseed meal, in the meal which they sold; and that their cattle would not eat the teelseed meal, unless linseed meal was mixed with it": That the meal mentioned in the plaintiff's declaration was sold to him at different times, during a period of several months, as linseed meal, by Richardson, or by one of the defendants; that said meal, or portions of it, was a mixture of teelseed and linseed; but that the plaintiff had no notice that it was not all linseed meal; and that said meal, so mixed, was of less value than clear linseed meal.

Among other instructions, given by the judge to the jury, were these: "1. That if one of the defendants sold the meal to the plaintiff, such defendant knowing that teelseed meal was of an inferior quality and less value than linseed meal, this knowledge would bind all the defendants, and be the same as if they all knew it. 2. That if L. Richardson, as foreman of the defendants, acting within the scope of his authority, sold the meal to the plaintiff, he (Richardson) knowing that teelseed meal was of an inferior quality and of less value than linseed meal, this knowledge would bind the defendants, and be the same as if the defendants knew it."

A verdict was found for the plaintiff, and the defendants alleged exceptions to the above instructions.

SHAW, C. J. Most of the questions, in the present case, turned upon matters of fact and were decided by the jury. The evidence, taken in connection with the verdict, shows that the purpose of the plaintiff was to purchase of the defendants linseed meal, and that the defendants, who carried on the business of manufacturing oil from seed, so understood it, but that they, that is, one of them personally, when present, and their foreman and general agent, acting within the scope of his authority, when they were absent, delivered to the plaintiff an inferior article, called teelseed meal, mixed with the linseed, in such a manner as to deceive the plaintiff, who purchased and paid for the whole as linseed, without knowledge of such mixture.

The defendants object to two of the instructions of the court of common pleas, as being incorrect in point of law. [Here the chief justice stated the instructions excepted to.] But we are of opinion that both those instructions were right. For although the action in form charges the defendants jointly for a deceit done by one only, or by an agent, yet it is still a civil action, and the claim is for damages.

The deceit was done for the defendants' benefit, by their agent acting under their orders, in the conduct of their general business, and responsible to them; and when one party must suffer by the wrong and misconduct of another, it is more reasonable that he should sustain the loss, who reposes the confidence in the agent, than he who has given no such confidence. Hern *v.* Nichols, 1 Salk. 289. The point is well illustrated by the law of insurance, where the party is always held responsible *civiliter*, for the fraudulent misrepresentation or other deceit, or for the negligence, of his agent. Fitzherbert *v.* Mather, 1 T. R. 12. But the rule is not confined to cases of insurance, in relation to which a somewhat stricter morality, perhaps, is held to prevail; but it is laid down as a general rule of the common law, that the principal is civilly responsible for the acts of his agent. Doe *v.* Martin, 4 T. R. 66. In a late case, in which it was held that a master was liable for the acts of his servant in a case *quasi* criminal — as for penalties incurred by a violation of the revenue laws — it was taken for granted, on all sides, that for deceit in articles sold by a servant in the shop of his master, or for acts done in the manufacture of articles in a manufactory usually carried on by the master, the latter is answerable. Attorney General *v.* Siddon, 1 Tyrw. 41. S. C. 1 Crompt. & Jerv. 220. The rule proceeds upon the ground that the servant is acting within the scope of his authority, actual or constructive. The case of a sheriff who is liable *civiliter*, even in an action of trespass, for the misconduct of his deputy, is another familiar application of the same rule. Grinnell *v.* Phillips, 1 Mass. 530. The rule is laid down generally, in a recent compilation of good authority, that though a principal, in general, is not liable criminally for the act of his agent, yet he is civilly liable for the neglect, fraud, deceit, or other wrongful act of his agent in the course of his employment, though in fact the principal did not authorize the practice of such acts; but the wrongful or unlawful acts must be committed in the course of the agent's employment. 3. Chit. Law of Com. & Man. 209, 210.

As to the other point, which is indeed little more than a further application of the same principle, it is laid down, as the general rule, that one partner is liable *civiliter* for damages sustained by the deceit or other fraudulent act of his copartner done within the scope of his general partnership authority. Collyer on Partnership, 241. Rapp *v.* Latham, 2 Barn. & Ald. 795. Willet *v.* Chambers, Cowp. 814.

Two cases were cited, by the counsel for the defendant, to support the contrary doctrine; but we think they are both distinguishable from

the present. In Pierce *v.* Jackson, 6 Mass. 245, it is said by *Parsons*, C. J., in the course of his opinion, that "a fraud committed by one of the partners shall not charge the partnership." This must be taken in connection with the subject matter to which it was applied. That action was not brought by an innocent party who had sustained damage by the fraudulent act of a partner in the course of the partnership business. On the contrary, it was a case of competition between different classes of creditors, one of whom was a creditor of one of the partners, and the other claimed a preference as creditor of the firm. But it appeared that one of the partners had, by fraud and by means of a forged indorsement of a note, given or attempted to give the latter creditor a preference to which he was not entitled. It was in reference to this transaction that the remark above cited was made. The plaintiff, in that case, must have been in collusion with one of the partners to obtain an undue preference; and to have sustained the claim of preference, under those circumstances, would have been to give effect to a fraudulent and collusive act, in favor of a party to the collusion, against an honest creditor.

The other case cited was Sherwood *v.* Marwick, 5 Greenl. 295. In that case, two persons were the beneficial owners of a foreign vessel held in the name of a third person. One of them, under a power from that third person, sold the vessel, and at the time of the sale made a false representation of her national character. The other was sued by the purchaser, in an action to recover damages alleged to have been sustained by reason of such false representation. It was held that he was not liable. The defendant and the seller, in that case, were not general partners, if indeed they were partners at all. The seller was not the general agent of the defendant, nor had he any authority, actual or constructive, to act for him. It seems to us therefore quite clear that the decision in that case is not in conflict with ours in the present.

Exceptions overruled.

HIGGINS *v.* WATERVLIET TURNPIKE CO.

COURT OF APPEALS, NEW YORK, 1871. 335-242

[*Reported* 46 *N. Y.* 23.]

ON the 13th day of July, 1866, plaintiff was a passenger on defendant's horse car in the city of Albany. He had paid his fare, and was forcibly thrown from the car by defendant's conductor and driver who claimed that he was drunk and disorderly. He gave evidence tending to show this was not so, and the jury so found.

ANDREWS, J. Upon the theory that the act of the conductor, in removing the plaintiff from the car, was unlawful, and was not justi-

fied by the circumstances, the court was requested by the counsel for the defendant to charge the jury, that the plaintiff could not recover for any personal injuries occasioned by the assault of the conductor, there being no evidence of authority from the company to commit it.

Upon the other theory of the case, that the expulsion was justified by the conduct of the plaintiff, but that unnecessary force, occasioning injury, was used in ejecting him, the court charged, that the defendant was liable for such injury.

Exception was taken by the defendant to the refusal of the court to charge as requested, and to the charge made. These exceptions present the questions made upon the argument.

The main contention on the trial related to the conduct of the plaintiff immediately before his removal from the car.

The evidence on the part of the defendant tended to show that he was noisy and disorderly; that he refused to obey the reasonable directions of the conductor, and that his expulsion was justified by his misconduct.

This version of the facts was controverted by the plaintiff, and we cannot decide, as a question of law, that the jury were not justified in finding with the plaintiff upon this issue.

But there is no evidence that the act of the conductor was prompted by malice, or any wrongful intention, or by any motive, except to discharge what he supposed to be his duty under the circumstances. The request to charge must be regarded as having been made with reference to this view of the facts, otherwise it was irrelevant and inapplicable to the case.

The expulsion of the plaintiff, if not justified by his misconduct, was an unlawful assault, and the question arises, whether the defendant is responsible for the injury occasioned by the unlawful act of its servant, done under a mistake of facts, or a mistake of judgment upon the facts, though in the course of the business of his master.

This question must be answered in the affirmative, in view of the nature of the service in which the conductor was engaged, and the principle upon which the liability of the master for the acts of the servant rests.

The conductor was put by the defendant in charge of the car. Passengers were bound to conform to the reasonable rules and regulations of the company, and to behave themselves in an orderly manner, promoting thereby the mutual interest of the company and the public.

The company had the right to enforce order and decency, by expelling from the car a passenger guilty of disorderly and indecent conduct.

The defendant could only act through agents. The appointment of a conductor carried with it as an incident authority to maintain order, and to eject a passenger who had forfeited his right to be carried by his misconduct.

This authority, it is true, was confined to the expulsion of persons

who, in fact, misbehaved themselves so as to justify their expulsion; but whether, in a given case, the misconduct was such as to justify an expulsion, must necessarily be determined at the time of the transaction.

The duty of deciding is cast upon the conductor; he represents the defendant; he may misunderstand or misjudge the facts; he may act unwisely or imprudently, or even recklessly; but the business of preserving order and enforcing the regulations of the company is committed to him, and for his acts in that business the company is responsible.

The master's liability for the negligence or tort of his servant does not depend upon the existence of an authority to do the particular act from which the injury resulted. In most cases where the master has been held liable for the negligence of his servant, not only was there an absence of authority to commit the wrong, but it was committed in violation of the duty which the servant owed to the master. The principal is bound, by a contract made in his name by an agent, only when the agent has an actual or apparent authority to make it; but the liability of a master for the tort of his servant does not depend primarily upon the possession of an authority to commit it. The question is not solved by comparing the act with the authority.

It is sufficient to make the master responsible *civiliter*, if the wrongful act of the servant was committed in the business of the master, and within the scope of his employment, and this, although the servant, in doing it, departed from the instructions of his master. This rule is founded upon public policy and convenience. Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed.

The omission of such care by the latter is the omission of the principal, and for injury resulting therefrom to others, the principal is justly held liable. If he employs incompetent or untrustworthy agents it is his fault; and whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim *respondeat superior* applies, provided only, that the agent was acting at the time for the principal, and within the scope of the business intrusted to him.

It is often stated, and with sufficient accuracy for general purposes, that a master is not liable for an assault committed by his servant.

It is said by *Lord Kenyon*, in the leading case of McManus *v.* Crickett (1 East, 106), "that when a servant quits sight of the object for which he was employed, and, without having in view his master's orders, pursues that which his own malice suggests, his master will not be liable for such acts." If for his own purposes, and not in his master's business, the servant commits an assault, the master is not responsible; and the statement that the master is not liable for the assault of his servant requires this qualification.

In the case of Sandford *v.* Eighth Avenue Railroad Company (23 N. Y. 343) the action was brought to recover damages, resulting from the death of the plaintiff's intestate, caused by his being thrown from the car of the defendant, by the conductor, when it was in motion. The deceased refused to pay his fare, and for that reason the conductor ejected him. The court held that the conduct of the intestate justified the conductor in expelling him from the car in a proper manner, but not when the car was in motion, and the defendant was held liable for the injury. *Comstock*, Ch. J., says: "The case is, therefore, to be stated thus: The defendants by their servant were guilty of a personal and intentional assault upon the intestate. The assault, as we think, was not in law justified by the fact, and they are consequently without a legal defense."

This case is in point against the defendant upon the question we have considered, and accords with the general principle, governing the liability of masters for the tortious acts of their servants. (Addison on Torts, 23; Smith on Master and Servant, 151; Story on Agency § 452.)

The charge of the court that the defendant was responsible for the excessive force used in ejecting the plaintiff from the car assumed that there was lawful cause for his expulsion. The charge, in our opinion, was, under the proof in the case, correct, and is supported by the considerations, to which we have adverted, in considering the other exception.

We are not called upon in this case to determine what the law is as to the master's responsibility, in a case where a conductor, though justified in using violence in expelling a passenger, wantonly and intentionally used unnecessary force to accomplish it, and where the justifiable and excessive force were parts of a single act. In this case that hypothesis is inadmissible. The evidence does not warrant the supposition that the conductor acted in bad faith or wantonly used unnecessary violence.

In Seymour *v.* Greenwood (7 H. & N. 356) it was held by the Court of Exchequer Chamber, that a master was liable for an injury caused by the unlawful and violent conduct of his servant in the performance of an act within the course of his employment. The case in its circumstances was quite like the case in question. The guard of the defendant's omnibus, in removing a passenger whom he deemed to be drunk, forcibly dragged him out and threw him on the ground, whereby he was severely injured. The passenger brought an action for the injury, and the defendant claimed that he had not authorized, and was not liable for the acts of the servant. *Williams*, J., in pronouncing the unanimous opinion of the court, said: "We think there was evidence for the jury that the guard, acting in the course of his service as guard of the defendant's omnibus, and in pursuance of that employment, was guilty of excess and violence not justified by the

occasion, or in other words, misconducted himself in the course of his master's employment, and, therefore, the master is responsible. It is said, that though it cannot be denied that the defendant authorized his guard to superintend the conduct of the omnibuses generally, and that such authority must be taken to include an authority to remove any passenger who misconducts himself, yet the defendant gave no authority to turn out an inoffensive passenger, and the plaintiff was one. But the master, by giving the guard authority to remove an offensive passenger, necessarily gave him authority to determine whether any passenger had misconducted himself. It is not convenient for the master personally to conduct the omnibuses, and he puts his guard in his place; therefore, if the guard forms a wrong judgment the master is responsible." (See, also, Limpass *v.* London General Omnibus Company, 1 H. & Colt. 526; Goff *v.* Great Nor. R'way Co., 30 L. J. Q. B. 148; Poulton *v.* London and South Western R'way Co., 2 L. R. 2 Q. B. 534.)

The remark of one of the judges in the case of Hibbard *v.* New York and Erie R. W. Co. (15 N. Y. 467) may not, when read in connection with the charge to which it referred, be consistent with the views here expressed. But the case was decided upon another point, and it is not an authority for the doctrine stated by the learned judge.

The judgment should be affirmed.

All concur, but PECKHAM, J., not voting.

Judgment affirmed.

BOOMER *v.* WILBUR.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1900.

[*Reported* 176 *Mass.* 482.]

TORT, for personal injuries occasioned to the plaintiff by the fall of brick and mortar from a chimney on the house of the defendants in Taunton upon the plaintiff while she was passing below on the sidewalk. At the trial in the Superior Court, before *Bond*, J., the jury returned a verdict for the plaintiff; and the defendants alleged exceptions, which appear in the opinion.

HAMMOND, J. The court instructed the jury in substance that where, under a contract between the owner of a house and the person doing the work, work is done upon the house, and the owner retains the right of access to and the control of the premises, and such work is ordinarily attended with danger to the public unless proper precautions are taken to avoid it, the owner is bound to the exercise of due care to see that such precautions are taken for the safety of the public; and if by reason of the failure to take such precautions a person lawfully on the street and in the exercise of due care is injured, the owner

is answerable notwithstanding the work is being done under a contract between him and the contractor. Having stated this as a general rule, the court applied it to this case as follows: "If the defendants employed a person to repair the chimneys on their buildings adjoining the highway under the contract, to repair them for a fixed sum, and the defendants retained the right, retained control, and the right of access to the building, and such work on the chimneys would ordinarily be attended with danger to the public unless proper precautions to avoid it were taken, the defendants were bound to take proper precautions, or to see that proper precautions were taken, for the safety of the public; and if the plaintiff was injured while she was lawfully on the street, adjoining the defendants' premises, and in the exercise of due care, by reason of the failure of the defendants to take proper precautions, or by reason of their failure to see that proper precautions were taken, to avoid such injury, then the defendants are liable for the injury."

We understand these instructions to mean that, even if the defendants employed a competent, independent contractor to repair these chimneys, who was to do the work without any dictation or supervision on the part of the defendants over the details of the work or the manner in which it should be done, the defendants would be answerable for the failure of the contractor to take proper precautions to protect travelers upon the highway from falling bricks.

While the master is liable for the negligence of the servant, yet when the person employed is engaged under an entire contract for a gross sum in an independent operation, and is not subject to the direction and control of his employer, the relation is not regarded as that of master and servant, but as that of contractor and contractee; and in such case the general rule is that the negligence of the contracting party cannot be charged upon him for whom the work is to be done; and this rule is applicable even where the owner of the land is the person who hires the contractor, and for whose benefit the work is done. Hilliard *v.* Richardson, 3 Gray, 349. Forsyth *v.* Hooper, 11 Allen, 419. Conners *v.* Hennessey, 112 Mass. 96. Harding *v.* Boston, 163 Mass. 14, 18. There are, however, some well-known exceptions to the rule. If the performance of the work will necessarily bring wrongful consequences to pass unless guarded against, and if the contract cannot be performed except under the right of the employer who retains the right of access, the law may hold the employer answerable for negligence in the performance of the work.

Woodman *v.* Metropolitan Railroad, 149 Mass. 335, was such a case, and the defendant was held liable for the act of an independent contractor hired by it to dig up and obstruct the streets for the purpose of laying down the track, upon the ground that the contract called for an obstruction to the highway which necessarily would be a nuisance unless properly guarded against.

The same principle is further illustrated in Curtis *v.* Kiley, 153

Mass. 123, and Thompson *v.* Lowell, Lawrence, & Haverhill Street Railway, 170 Mass. 577.

Again, if the contract calls for the construction of a nuisance upon the land of the employer, he may be held answerable for the consequences. In Gorham *v.* Gross, 125 Mass. 232, the defendant had caused to be constructed by an independent contractor a party wall, half on the defendant's land and half upon adjoining land, and after it was completed and accepted it fell, causing damage to the property of the adjoining landowner. There was evidence that the fall of the wall was occasioned by negligence in its construction. The court said that the wall as constructed was a nuisance "likely to do mischief," and held the defendant answerable for the damage caused by its fall.

To the same effect is Cork *v.* Blossom, 162 Mass. 330.

The instructions to the jury allowed them to find a verdict for the plaintiff, not upon the ground that the chimney was a nuisance "likely to do mischief," but upon the ground that the work of repair called for by the contract was necessarily a nuisance within the rule stated in Woodman *v.* Metropolitan Railroad, *ubi supra*, and other similar cases.

The work called for was the repair of chimneys. At most the brick were to be taken off for a few feet and relaid. The work which was to be done was not such as would necessarily endanger persons in the street. It did not involve throwing the brick into the street, or causing or allowing them to fall so as to endanger persons traveling therein. It is plain that unless there was negligence in the actual handling of the brick, there could be no injury to the passing traveler. The case very much resembles Pye *v.* Faxon, 156 Mass. 471. The plaintiff in that case, being the tenant of a house, sued the owner of an adjoining lot for trespasses alleged to have been committed upon the plaintiff's estate by the defendant while engaged in constructing a large building on his lot. It appeared from the testimony that the wall next to the plaintiff's house was not built on the boundary line, but was several inches from it, and that the staging used in building it was placed upon the inside; that the brick when laid pressed out the mortar, which was then scraped off by the trowels of the masons, and some of it dropped upon the plaintiff's land, upon her rear windows, and upon the clothes hanging in her back yard. At the trial the presiding judge instructed the jury that if the dropping of the mortar was from the carelessness of the workman the defendant was not liable, but if it was something necessarily involved in the building of the wall, then he might be liable; and these instructions were held to be correct.

This is not a case where the work, even if properly done, creates a peril, unless guarded against, as in the cases relied upon by the plaintiff. The accident was caused by the act of the contractor in doing

what it was not necessary for him to do, what he was not expected to do, and what he did not intend to do. If it had been necessary for him to topple the chimney over into the street, or to remove the bricks by letting them fall into it, or the contract had contemplated such action, the instructions would not have been objectionable; but as this was not necessary or intended, the work could not be classed as work which, if properly done, was ordinarily attended with danger to the public.

The negligence, if any, was in a mere detail of the work. The contract did not contemplate such negligence, and the negligent party is the only one to be held. The case is clearly distinguishable from Woodman *v.* Metropolitan Railroad, *ubi supra*, and others of a like character, and must be classed with Conners *v.* Hennessey, *ubi supra*, and others like it.[1]

342742

DOLL *v.* RIBETTI.

CIRCUIT COURT OF APPEALS, 1913.

[*Reported* 203 *Fed.* 593.]

GRAY, Circuit Judge. The defendant in error (hereinafter called the plaintiff) brought an action of trespass in the court below against the plaintiff in error (hereinafter called the defendant), to recover damages for personal injuries received by him while passing along the sidewalk in front of the building occupied by defendant, in the city of Pittsburgh. The statement of claim sets forth the following:

That on the 14th day of February, 1910, and prior thereto, defendant was the lessee and occupant of a certain building on Penn Avenue, one of the principal streets in the said city of Pittsburgh and devoted chiefly to business purposes. The building was six stories in height and stood flush with the sidewalk of Penn Avenue, with windows of the ordinary type, intended to be opened and closed by sliding their sashes up and down. Along the side of the said street next to this building was the usual sidewalk, which, being in a frequented part of the city, was in constant use by pedestrians at all hours of the day.

That in the said city of Pittsburgh, it had been a custom to have the windows of such buildings cleaned by persons standing outside of the sash and on the sills of the windows, secured from falling by a stout belt worn about the waist, with a strap on each side thereof, fastened to a hook or other fixture set for the purpose in the side frames or

[1] The remainder of the opinion, in which a question of evidence is discussed, is omitted.

See also State *v.* General Stevedoring Co., 213 Fed. 51, 70, 72; Davis *v.* Whiting, 201 Mass. 92; Berg *v.* Parsons, 176 N. Y. 109; Sanford *v.* Pawtucket St. Ry., 19 R. I. 537. — ED.

casing of each window. That it was also a custom for persons engaged in the cleaning of windows, whether for themselves or under contract for others, to provide their workmen so engaged with belts and straps and the appropriate hooks or fixtures, for use in connection therewith, for the obvious purpose of protecting, as well the persons passing along the sidewalk as the cleaners themselves, and that windows on high buildings were generally equipped by the owners or occupiers thereof with such hooks or other fixtures.

It is then averred that the building occupied by the defendant was not and never had been provided with such hooks, or with any other fit or appropriate fixtures, for the purpose stated.

That at sometime before said 14th day of February, 1910, defendant entered into a contract with one Hearn, for cleaning the windows of the said building at stated intervals. That on that day, the windows opening upon said avenue were being cleaned under said contract by the agents and servants of Hearn. H. C. Burrell, one of said agents or servants, while so engaged, was standing on the outer sills of the windows while doing his work, without using a safety belt or other adequate safety appliance, as theretofore referred to, to prevent him from falling.

The defendant, long prior to said 14th day of February, 1910, "knew, or by the exercise of reasonable care should have known, that the windows of the building were not equipped with the customary hooks or other appropriate fixtures hereinbefore referred to; and knew, or by the exercise of reasonable care should have known, that some of the windows giving upon Penn Avenue were so defective . . . that they could not be cleaned on the outside, except by persons standing on the outer sills thereof."

That on the day last aforesaid, while plaintiff was lawfully walking upon the sidewalk on Penn Avenue, and passing the said building, the said Burrell, then engaged in so cleaning a window on the fourth story front thereof, above said sidewalk, and without the knowledge of the plaintiff, accidentally lost his balance and fell upon plaintiff, thereby injuring him, as thereinafter set forth.

The plaintiff was a physician and surgeon, practicing in the city of Pittsburgh, and was severely and permanently injured by this accident.

The facts alleged in the statement of claim are for the most part undisputed, and there was evidence tending to support all of the allegations of fact upon which were based the charge of negligence of the defendant. The case was submitted to the jury, with a charge by the court, and to the judgment upon the verdict in favor of the plaintiff this writ of error is taken.

The only question raised by the assignments of error (apart from the one founded on the refusal of the court to direct a verdict for the defendant), is as to the legal responsibility of the defendant, as occu-

pant of the building, for such neglect or default of an independent contractor undertaking to clean defendant's windows, as made the work unreasonably dangerous to those of the public lawfully using the sidewalk beneath. It was insisted by the defendant in the court below, as here, that the window cleaning contractor, being a man skilled and experienced in that line of work, had taken the responsibility for the conduct thereof out of the hands of the defendant into his own, and that he alone, and not the defendant, was liable for any negligence in the conduct of that work.

In this case, however, we agree with the court below, that the fact that the work was in the hands of an independent contractor cannot be interposed as a defense to the liability with which the defendant is sought to be charged.

The defendant was a lessee and occupier of the building in question. As such, he was in control thereof, and the law imposes upon such occupier a very positive duty to those using the highway upon which the building abuts, to use the care requisite, according to the circumstances, to guard them against injury resulting from the condition of the premises, or from what is being done in or about the same, by the direction or permission, or for the convenience and benefit, of the occupier. In cases like the present, the exigence of such duty is not affected by the fact that the faulty conditions, from which resulted the damage complained of, were due to the negligence of an independent contractor in operating under the contract. This duty is peculiar to the situation, and is as just as it is severe. It places the responsibility for what happens on such premises on the occupier who is in control of the same, and protects those of the public who, in the use of the highway along such premises, lawfully come within dangers originating thereon. Of such dangers, the casual user of a sidewalk is generally unwarned, and the matters from which they arise are specially within the knowledge, or should be within the knowledge, of the occupier.

What is said by Sir Frederick Pollock in his philosophical work on Torts, in relation to the duties imposed by law on the occupiers of buildings, applies as well to the duty of such occupiers to those who are in lawful use of the adjacent highway, as to the duty to those who resort to the premises in the course of business in which the occupier is concerned or interested:

"The duty is founded not on ownership but on possession, in other words, on the structure being maintained under the control and for the purposes of the person held answerable. It goes beyond the common doctrine of responsibility for servants, for the occupier cannot discharge himself by employing an independent contractor for the maintenance and repair of the structure, however careful he may be in the choice of that contractor. Thus the duty is described as being impersonal rather than personal. Personal diligence on the part of the occu-

pier and his servants is immaterial. The structure has to be in a reasonably safe condition, so far as the exercise of reasonable care and skill can make it so. To that extent there is a limited duty of insurance, as one may call it, though not a strict duty of insurance such as exists in the classes of cases governed by Rylands v. Fletcher [L. R. 3 H. L. 330, 37 L. J. Ex. 161]."

Where the thing committed to an independent contractor to do for the occupier, on or about his premises, is of itself inherently dangerous, such contractor is the mere instrument or agent of the occupier, so far as concerns the responsibility to those lawfully coming within such danger. In the present case, the responsibility of the defendant, as occupier, is the same as if the window cleaner, who fell from the window sill, had been the ordinary servant of the defendant. He was bound in either case to use the care requisite to see that the work of cleaning his windows was not made unreasonably dangerous to one passing on the sidewalk. This, in effect, is the principle announced by the Supreme Court in the case of Water Co. v. Ware, 16 Wall. 566, 21 L. Ed. 485:

"When a person is engaged in a work, in the ordinary doing of which a nuisance occurs, the person is liable for any injury that may result to third parties from carelessness or negligence, though the work may be done by a contractor."

The duty imposed by law on the occupier is an absolute duty, which he cannot shift. It is by reason of his control thereof, that the occupier of premises on a public street or highway owes, as has been said, a duty of quasi insurance to those using the highway against injury resulting from the condition of the premises, or from what is being done on or about the same for the convenience and benefit of the occupier. So a general contractor having possession and control, for the purpose of erecting buildings for the owner of the premises, cannot relieve himself from liability for a dangerous situation, though created by an independent subcontractor, as recently decided by this court in the case of Wilson v. Hibbert, 194 Fed. 838, 114 C. C. A. 542.

There is little or no difference in English or American authorities on this point, and it is unnecessary to cite the long list of such authorities which have been brought to our attention by the ability and industry of the learned counsel of the defendant in error. This principle was given a wider application by the Supreme Court in the case of Chicago v. Robbins, 2 Black, 418, 17 L. Ed. 298. In that case, the defendant, owning a lot in Chicago, contracted in writing with another to erect a building thereon, which included the excavation of an area in the sidewalk next to and adjoining it, so as to furnish light and air to the basement. After the excavation had been made, it was left unguarded by the contractor, and the plaintiff was injured by falling therein. On the ground that the contractor was doing the thing

which he was employed to do, which was inherently dangerous to the users of the sidewalk, the court held the owner who had employed the contractor liable for the injury occasioned by the neglect to surround the excavation with sufficient lights and guards. Speaking of the owner and employer, the court said:

"He cannot escape liability by letting work out like this to a contractor and shift responsibility on him if an accident occurs. He cannot even refrain from directing his contractor in the execution of the work, so as to avoid making the nuisance. A hole cannot be dug in the sidewalk of a large city and left without guards and light at night, without great danger to life and limb, and he who orders it dug, and makes no provision for its safety, is chargeable, if injury is suffered."

This wider and more inclusive rule is variously stated in a multitude of cases, both English and American, and is very clearly stated by the Supreme Court of Ohio in Covington & Cincinnati Bridge Co. *v.* Steinbrock, 61 Ohio St. 223, 55 N. E. 619, 76 Am. St. Rep. 375:

"The weight of reason and authority is to the effect that where a party is under a duty to the public or third person to see that work he is about to do or have done is carefully performed, so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability in case it is negligently done to the injury of another. . . . It is the danger to others, incident to the performance of the work let to contract, that raises the duty and which the employer cannot shift from himself to another so as to avoid liability, should injury result to another from negligence in doing the work."

In such cases, the principal makes the contractor an agent or servant, for whose negligence he is responsible. So in the English case of Bower *v.* Peate, 1 Q. B. Div. 321. Here the plaintiff and defendant occupied adjoining houses. Defendant, having decided to rebuild his house and in doing so to carry his foundations lower than the foundations of the plaintiff's adjoining house, entered into a contract with a builder to do all the necessary work. The written contract contained a clause by which the contractor agreed to take upon himself the risk and responsibility of shoring and supporting, as far as necessary, the adjoining building affected by this alteration, during the progress of the work. Cockburn, C. J., delivering the opinion of the Queen's Bench Division of the High Court of Justice, says:

"The answer to defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing

some one else — whether it be the contractor employed to do the work, from which the danger arises, or some independent person — to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."

See, also, Tarry *v.* Ashton, 1 Q. B. Div. 314.

If the work to be done by the contractor for the occupier is necessarily attended with some danger, even when performed without negligence by the contractor, such occupier would be responsible for having neglected to guard against such inevitable danger should an innocent third person suffer injury therefrom. Thus, in the case of Jager *v.* Adams, 123 Mass. 26, 25 Am. Rep. 7, where one was building a brick wall abutting on the highway, and plaintiff was injured by a falling brick, though the servant who dropped it was not negligent, the court said:

"It is a matter of common knowledge and experience that when men are breaking and handling bricks in the construction of such a wall, some of the material may fall, although the workmen are in the exercise of ordinary care. The immediate cause of the evil in such case may indeed be accidental, but it is an accident which the builder of the wall, in view of the danger to life and limb, may be bound to contemplate and provide against by safeguards or barriers, so that the traveler may not be exposed to injury."

See, also, Shipley *v.* Fifty Associates, 101 Mass. 251, 3 Am. Rep. 346.

We have not overlooked the fact that the falling body by which the plaintiff was injured was a living man, capable of exercising his own will and capable, therefore, of causing or contributing to his fall by his own negligence. But we have not been able to discover in these facts a sufficient reason for relieving the occupier of the premises from liability. As we have tried to show, the man whose fall did the harm in question must be regarded as the servant of the occupier, although an independent contractor did intervene, and the occupier cannot escape liability for the negligence of his servant and agent, even under such unusual circumstances as these. On principle, the servant's control over his own will and his own movements does not seem to make any difference. The occupier was the master, and if in that character he had ordered the servant to assume the dangerous position, and the fall had taken place while the servant was obeying the order, the master would have been as completely liable as if the falling body had been an inanimate object carelessly placed on the window ledge. And we think the same result must follow, although the master knowingly permits (but does not directly order) his servant to assume a position so dangerous that the servant's lack of care for his own safety may be followed by injury to an innocent passer-by. This is little more than a restatement of the proposition, that he who, either himself or by an agent, does an act inherently dangerous to the innocent

users of a highway — whether the order be given directly or through the mouth of an independent contractor — is charged with a high degree of responsibility, nearly akin to the responsibility of an insurer.

The court, having correctly instructed the jury that the employment by defendant of an independent contractor to clean the windows of his building was not available as a defense, it only remained to submit to the jury, not whether this work was dangerous, but whether defendant had used reasonable care in guarding against the dangers that were naturally incident thereto. It is a matter of common knowledge that work done on the outside of a building, such as in this case, or in the case of work done on scaffolding, is attended with dangers to those using the sidewalk beneath. Such accidents, whether negligent or non-negligent, must be guarded against, either by means calculated to prevent the falling of bodies, or by such barriers or warning notices as would prevent the use of the sidewalk within the area of danger, the only question to be determined being whether defendant has used reasonable care to safeguard the situation.

The charge of the court below was in another respect more favorable to the defendant than it had a right to demand. The jury were repeatedly instructed that the burden rested upon the plaintiff to show, first, that this work was dangerous work, and second, that the defendant was guilty of negligence in not acting as a person of ordinary prudence should act, in order to guard against its dangers. The rule of evidence applicable in such cases is thus stated by Sir Frederick Pollock:

"Where damage is done by the falling of objects into a highway from a building, the modern rule is that the accident, in the absence of explanation, is of itself evidence of negligence. In other words, the burden of proof is on the occupier of the building. If he cannot show that the accident was due to some cause consistent with the due repair and careful management of the structure, he is liable."

In other words, the maxim *res ipsa loquitur* is applicable to cases like the present. This rule rests upon both reason and authority. It is the dictate of a wise public policy, that of protecting the right of those lawfully using the public highways, to be unmenaced by dangers resulting from the condition of adjoining premises, or from what is being done for, or by permission of, the occupiers, on or about the same. These things, though known to such occupiers, cannot be known or appreciated by the users of the highways. Bodies are not expected to fall from the windows of buildings, upon the adjoining highways. Such happenings are not consistent with the usual and orderly conduct and ménage of such buildings.

The leading cases of Byrne *v.* Boadle, 2 H. & C. 722, and of Kearney *v.* London, Brighton & South Coast Railway Co., 6 Q. B. Cas. 759, have been followed by many other cases, both in England and in this country, and the applicability of the rule of evidence em-

bodied in the maxim *res ipsa loquitur*, to objects falling from buildings into a highway, is well established.

The jury, however, having found both the questions thus submitted in favor of the plaintiff, the assignments of error, as to the charge of the court in regard to the defense of an independent contractor, are overruled, and the judgment below is hereby affirmed.[1]

SECTION II.

Liability for Animals.

3492d 2

LYONS v. MERRICK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1870.

[*Reported* 105 *Mass.* 71.]

AT the trial in the Superior Court, before *Devens*, J., the plaintiff offered evidence tending to show that the defendant's mule, and the horse of Fuller, which the defendant was pasturing for hire, came into the plaintiff's pasture and there so chased, kicked, and injured the plaintiff's mare that she died; that the mule was accustomed, before the time of this injury, to jump and escape from the lots of the defendant; that the defendant knew of this habit of the mule; and that the lot where the defendant placed the mule and horse was insufficiently and negligently fenced.

It appeared that the lot of the defendant, from which the mule and horse escaped, was situated about half a mile from the plaintiff's pasture; that next to the defendant's lot was the lot of Peter Glover, next to Glover's lot was a lot of Simon Bloomer, and next to Bloomer's lot was the pasture of the plaintiff.

The defendant offered evidence tending to show that "the partition fence between his lot and Glover's had not been legally divided, but that for the purpose of repairs one portion had always been repaired by himself and those under whom he claimed, and the other by Glover and those under whom he claimed; that the animals escaped through that portion of the fence which Glover was accustomed to keep in repair, and that it was not a lawful fence; that between Glover's lot and Bloomer's lot there was no fence at all, and between Bloomer's lot and the plaintiff's pasture was not a lawful fence; and that after the animals escaped into Glover's lot, they then passed through

[1] See, also, Chicago v. Robbins, 2 Black, 418; Water Co. v. Ware, 16 Wall, 567, 576; Wetherbee v. Partridge, 175 Mass. 185; Storrs v. Utica, 17 N. Y. 104; Bower v. Peate, 1 Q. B. D. 321. — ED.

Bloomer's lot and over the insufficient fence next the plaintiff's pasture into the pasture." [1]

COLT, J. The declaration charges the defendant with negligence in turning his mule, and a horse which he was keeping for hire, into a pasture insufficiently fenced. The instructions given at the trial, as to what would be negligence in this regard, were full and accurate. The defendant cannot avoid the liability by showing that the obligation to maintain that part of the fence through which the animals escaped was upon a third party, who owned the adjoining land over which the animals passed on their way to the plaintiff's pasture. The rights and obligations existing between adjoining owners in respect to fencing, whether regulated by statute, or by agreement, do not affect the right to recover in this case. At common law, the tenant must keep his cattle upon his own land at his peril. The defendant, as against the plaintiff, is subject to this common law duty, the parties are not adjoining owners, and their obligations are not affected by statute in this respect. It was negligence to turn the animals into a lot insecurely fenced, for which the defendant is responsible if any injury ensued, without regard to the obligations existing between the defendant and the tenant of the next lot. It may be that the defendant would not be liable in trespass for their escape into that lot, if the tenant of it was in fault, for no one can recover for an injury to which his own negligence contributed. And yet as to the plaintiff, the animals while in that lot were unlawfully there, and no obligation rested upon him to fence his lot against them. It was therefore immaterial what the condition of the fence around the plaintiff's pasture was. Rust *v.* Low, 6 Mass. 90. Eames *v.* Salem & Lowell Railroad Co., 98 Mass. 560. The instructions asked for on this part of the case could not be properly given.

The other instructions asked were also properly refused. The owner of an animal, or the person who in his place and by contract with him has the exclusive custody and control of it, is liable for injuries which he negligently suffers it to commit. The liability stands wholly upon the ground of actual or presumed negligence. If the injury is committed while trespassing upon the lands of others, the owner is chargeable, and is responsible for the damage which directly results therefrom as the natural and probable consequence. In other cases he may be liable, although there is no trespass, and the animal is rightfully in the place where the mischief is done; as where the injury comes from the vicious disposition or mischievous habits of the animal, of which the owner had previous actual notice; or where, without actual notice, the disposition and habits are so universal among the species that notice is presumed, as in the case of wild and savage beasts. The owner or keeper of such animals, with actual or implied notice of their character, is bound at his peril to keep them, at all times and in all

[1] Pleadings, requests to charge, and arguments are omitted. — ED.

places, properly secured; and is responsible to any one who without fault on his own part is injured by them.

The rulings which were asked on this point proceed upon the ground that the defendant could not be held liable, and the action could not be maintained at all, without proof of knowledge on his part that these animals were vicious and accustomed to do mischief. But, on the part of the defendant, there was negligence enough to support the action, in placing the animals where they would be likely to escape and become trespassers upon the plaintiff; and upon the question of the right to maintain the action the defendant's knowledge or want of knowledge of their character was immaterial. We are not required to consider what effect, if any, it would have upon the amount of the damages for which he would be liable.

The form of the plaintiff's declaration does not require him to prove the alleged viciousness and the defendant's knowledge, because without these allegations there is enough stated to charge the defendant with negligence, and the plaintiff was bound to prove no more than was necessary to make out his case. This is the rule in actions of tort, where the plaintiff is not obliged to prove allegations not essentially descriptive or so connected with material averments that they cannot be separated. McDonald *v.* Snelling, 14 Allen, 290. Barnes *v.* Chapin, 4 Allen, 444. Decker *v.* Gammon, 44 Maine, 322. Shearman & Redfield on Negligence, § 185.

As to the defendant's liability for the damage done by the horse which he was keeping for hire, the rule laid down at the trial was certainly sufficiently favorable to him. Barnum *v.* Vandusen, 16 Conn. 200.

Exceptions overruled.

VREDENBURG *v.* BEHAN.

SUPREME COURT OF LOUISIANA, 1881.

[*Reported* 33 *La. Ann.* 627.]

TODD, J.[1] . . .

1. The facts out of which this controversy grew are, substantially, as follows:

The defendants were members of an association or society known as the Crescent City Rifle Club.

In July, 1877, the club, wishing to send some of its members north to participate in an inter-State rifle shooting match, about to take place in New York, for the purpose of providing means therefor, concluded to give an entertainment at Milneburg, on Lake Pontchartrain. The Continental Guards, a military company of the city of New Orleans,

[1] Part of the opinion is omitted. — ED.

to further the object in view, and as a contribution to the proposed entertainment, offered to the Club a bear, owned by the officers of the company, "as a prize to be shot for" on the occasion. The offer was accepted, and a member of the club was instructed to make the necessary arrangements for shooting for the bear.

The entertainment came off on the 3d of August, 1877, the bear was brought on the ground and was offered as a prize, as previously arranged. He was won by William Arms, a member of the club, and one of the defendants. Arms put him up again to be shot for, and this time he was won by another person, who, however, declined to claim the prize. Arms had the bear taken to the grounds of the club, and caused him to be chained to the corner of the club-house; and there the bear remained until the 30th of October, 1877. These grounds had been leased by the club, and the house erected by it belonged, by the terms of their charter, to the members of the club.

The pasture of Mr. Vredenburg, who was engaged in a dairy business, adjoined the grounds of the rifle club, and he and his employees in going to and from the pasture passed through these club grounds. On the evening of the 30th of October, Mr. Vredenburg went to the pasture after his cows. A short time thereafter, as he was returning from the pasture, he was attacked by the bear, which in the meantime had gotten loose, and received the injuries of which he subsequently died. Tetanus or locked-jaw supervened, attended with great suffering, and his death occurred on the 27th November, twenty-one days after the wounds were inflicted. It is shown that just after Mr. Vredenburg passed through the club grounds on his way to the pasture, a boy, who was employed by him to assist in driving his cattle, and in his dairy business generally, came into the club grounds accompanied by a small dog, and teased the bear by setting the dog on him; and it was whilst the animal was thus worried, that he twisted his collar off, and ran after the dog and finally encountered Mr. Vredenburg; and just as he attacked him he was whipped by his keeper in an effort to prevent the attack, which only served to enrage him the more.

This last-mentioned fact, touching the acts of the hired boy in causing the bear to break loose, is charged to have remotely caused or contributed to the death of the deceased, and is relied on by the defendants as a ground to relieve them of responsibility for the result; and though not strictly in the order of pleading adopted by their counsel, it is well to consider it at once, and eliminate it from the case.

2. The doctrine of contributory negligence has never been carried to the extent contended for in this instance. Had the acts referred to been committed by Vredenburg himself, there would be great force in the plea urged; and the principle invoked would be strictly applicable. It is for his own acts, however, in this respect, that a man is bound and for which he must suffer; but he cannot be held equally answerable for the acts, faults, and negligence of his employee.

The master or employer is only answerable for the faults of his employee when committed "in the exercise of the functions of his employment, and when he might have prevented the act and not done it." C. C. 2320.

In this instance, the boy's act was not in the remotest degree connected with his employment; his employer was not present, was not knowing or consenting to it; and it was not in his power to prevent it.

Besides, the responsibility attaching to those who own, control, or keep animals *ferœ naturæ*, to which class a bear belongs, is of that strict and grave character as not to be relieved or modified by considerations of the kind presented, nor to be measured by rules that apply to owners or keepers of domestic animals.

Animals of this kind, such as lions, tigers, bears, are universally recognized as dangerous. It is the duty of those who own or keep them, to keep them in such a manner as to prevent them from doing harm, under any circumstances, whether provoked, as they are liable to be, or not provoked. There must be security against them under all contingencies. Domat, p. 475; Merlin, Répertoire, tome 26, p. 242, verbo Quasi-Delit; Marcadé, tome 5, pp. 272, 273; 1 Law Repts., p. 263; 3 Law Repts., p. 330.

Nor does it matter that an animal of this kind may be to some extent tame and domesticated; the natural wildness and ferocity of his nature but sleeps, and is liable to be awakened at any moment, suddenly and unexpectedly, under some provocation, as was the case in this instance.

If the defendants are otherwise liable for the acts of the bear, the acts of the boy in provoking him cannot, for these reasons, affect in the least that liability. . . .

4. A great deal of testimony was taken that had little or no bearing upon the real issues involved in the case, and many bills of exception appear in the record embodying the objections to its admission. These objections went mainly to the effect of the evidence, as held by the judge *a quo*, though much of it was wholly irrelevant.

The conclusion we have come to touching the merits of the case, and the disposition we shall make of it, render it unnecessary that we should pass upon these various bills. The salient facts of the case, and upon which our conclusions mainly rest, summarized from the statement heretofore given, are these:

That the bear was accepted by the rifle club as a prize to be shot for under the auspices of the club, and to raise a fund for the purposes of the club; that it was shot for, and subsequently carried to the club grounds by the direction of a member of the club and one of the defendants; that it was kept there and fed there for nearly three months by an employee of the club, and the expenses for its keeping and feeding paid for by the treasurer of the club, and an account of such expenses submitted to the governing committee of the club, of which some of

the defendants were members; that it was seen from time to time at the club house by members of the club and by all of the defendants save one; that no one objected to his being there; that whilst thus kept on the club grounds in charge of a keeper, he broke loose, attacked and wounded Mr. Vredenburg, who died of the wounds inflicted.

The Code declares, "that every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

That a person is responsible for the damage resulting from "his negligence or imprudence." That he is answerable, not only for his own acts, but for the acts of persons for whom he is responsible, and of things in his custody. C. C. 2315, 2316, 2317, 2321.

The law upon this subject is to the same effect under every enlightened system of jurisprudence.

Thus a distinguished writer on this subject has said:

"The mere keeping of an animal of a fierce nature, such as a tiger or bear, or dog known to be wont to bite, is unlawful, and therefore, if any person is bitten or injured by such an animal, an action is maintainable against the person who keeps it." Addison on Torts, pp. 22, 230.

And again:

"The owner of wild and savage beasts, such as lions, tigers, wolves, bears, etc., if he neglects to keep them properly secured, is liable for injuries committed by them according to their nature, without any evidence that he knew them to be ferocious, or that he was negligent in the mode of keeping them, since he is bound in ordinary prudence to know that fact and to secure them from doing harm." Shearman and Redfield on Negligence, § 188.

"One who harbors a dangerous animal on his premises, though not his owner in any sense, is nevertheless responsible for injuries committed by it while on or near his premises, to the same extent as if he owned it." Shearman and Redfield on Negligence, pp. 227, 228.

Mr. Justice Blackburn, of the English Court of Exchequer, thus lays down the rule on this subject:

"We think the true rule of law is, that the person, who for his own use or pleasure brings on his land, and collects and keeps there anything likely to do mischief, if it escapes, must keep it at his peril, and if he does not do so is *prima facie* answerable for all the damage, which is the natural consequence of its escape. . . . This is, we think, established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

Fletcher *v.* Rylands, Court of Exchequer, 1 Law Repts., 263; see, also, Hale's Pleas of the Crown, vol. 1, 430; May *v.* Bourdetts, 9th Adolphus & Ellis (3 Q. B.) N. S. 101; Earl *v.* Van Alstein, 8 Barbour, N. Y. 630; 41 Cal. 138.

These principles thus enunciated are sound and have our full approval.

There is a recognition of their spirit in an ordinance of the city of New Orleans on the subject, which declares:

"No wild or ferocious animals shall be kept within the limits of the city, on the premises of individuals, or in menageries, unless such animals be under the charge of an armed guard day and night."

Leovy's City Laws and Ordinances, Art. 703.

And it is to be noted that this bear was kept on the club grounds, within the city limits, in open disregard of this ordinance.

The fundamental principle on which the liability of the defendants rests, is concisely expressed in the following legal maxim, that is as old as the law itself and recognized in every known system of jurisprudence: *Sic utere tuo ut alienum non laedas.*

Proprietors or co-proprietors of lands or houses must not permit their property to be put to such uses as to cause injury to others, whether by being made a refuge for noxious animals or a magazine for gun powder, dynamite, or other explosive substances, or as a generator of foul and pestilential vapors destructive of health. And there was a tacit, though clear recognition of this principle by the defendants themselves, or some of them, in calling a meeting after Mr. Vredenburg's death to raise contributions for the relief of his family. No liability was openly avowed or intended to be acknowledged on account of this sad affair by such action, but there was a latent sense of responsibility evidently felt, which found expression in the language of one of the defendants, when testifying as a witness on the trial of the case, and who said by way of explaining the motive that prompted the proposed assistance, "that it was on account of the accident occurring on the grounds of the club."

FILBURN *v.* PEOPLE'S PALACE & AQUARIUM CO., LTD.

COURT OF APPEAL, 1890.

[*Reported* 25 *Q. B. D.* 258.]

355 Lit

APPEAL from a judgment of *Day*, J.

The action was brought to recover damages for injuries sustained by the plaintiff by his being attacked by an elephant, which was the property of the defendants, and was being exhibited by them. The learned judge left three questions to the jury: whether the elephant was an animal dangerous to man; whether the defendant knew the elephant to be dangerous; and whether the plaintiff brought the attack on himself. The jury answered all three questions in the negative. The learned judge entered judgment for the plaintiff for a sum agreed upon in case the plaintiff should be entitled to recover.

The defendants appealed.

LORD ESHER, M. R. The only difficulty I feel in the decision of this case is whether it is possible to enunciate any formula under which this and similar cases may be classified. The law of England recognizes two distinct classes of animals; and as to one of those classes, it cannot be doubted that a person who keeps an animal belonging to that class must prevent it from doing injury, and it is immaterial whether he knows it to be dangerous or not. As to another class, the law assumes that animals belonging to it are not of a dangerous nature, and anyone who keeps an animal of this kind is not liable for the damage it may do, unless he knew that it was dangerous. What, then, is the best way of dealing generally with these different cases? I suppose there can be no dispute that there are some animals that every one must recognize as not being dangerous on account of their nature. Whether they are *ferœ naturæ* so far as rights of property are concerned is not the question; they certainly are not so in the sense that they are dangerous. There is another set of animals that the law has recognized in England as not being of a dangerous nature, such as sheep, horses, oxen, dogs, and others that I will not attempt to enumerate. I take it this recognition has come about from the fact that years ago, and continuously to the present time, the progeny of these classes has been found by experience to be harmless, and so the law assumes the result of this experience to be correct without further proof. Unless an animal is brought within one of these two descriptions — that is, unless it is shown to be either harmless by its very nature, or to belong to a class that has become so by what may be called cultivation — it falls within the class of animals as to which the rule is, that a man who keeps one must take the responsibility of keeping it safe. It cannot possibly be said that an elephant comes within the class of animals known to be harmless by nature, or within that shown by experience to be harmless in this country, and consequently it falls within the class of animals that a man keeps at his peril, and which he must prevent from doing injury under any circumstances, unless the person to whom the injury is done brings it on himself. It was, therefore, immaterial in this case whether the particular animal was a dangerous one, or whether the defendants had any knowledge that it was so. The judgment entered was in these circumstances right, and the appeal must be dismissed.

LINDLEY, L. J. I am of the same opinion. The last case of this kind discussed was May *v.* Burdett,[1] but there the monkey which did the mischief was said to be accustomed to attack mankind, to the knowledge of the person who kept it. That does not decide this case. We have had no case cited to us, nor any evidence, to show that elephants in this country are not as a class dangerous; nor are they com-

[1] 9 Q. B. 101.

monly known here to belong to the class of domesticated animals. Therefore a person who keeps one is liable, though he does not know that the particular one that he keeps is mischievous. Applying that principle to this case, it appears that the judgment for the plaintiff was right, and this appeal must be dismissed.

BOWEN, L. J. I am of the same opinion. The broad principle that governs this case is that laid down in Fletcher *v.* Rylands,[1] that a person who brings upon his land anything that would not naturally come upon it, and which is in itself dangerous, must take care that it is kept under proper control. The question of liability for damage done by mischievous animals is a branch of that law which has been applied in the same way from the times of *Lord Holt*[2] and of *Hale* until now. People must not be wiser than the experience of mankind. If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do. If, on the other hand, the animal kept belongs to a class which, according to the experience of mankind is not dangerous and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief. It cannot be doubted that elephants as a class have not been reduced to a state of subjection; they still remain wild and untamed, though individuals are brought to a degree of tameness which amounts to domestication. A person, therefore, who keeps an elephant, does so at his own risk, and an action can be maintained for any injury done by it, although the owner had no knowledge of its mischievous propensities. I agree, therefore, that the appeal must be dismissed.

Appeal dismissed.

HARDIMAN *v.* WHOLLEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1899.

[*Reported* 172 *Mass.* 411.]

HOLMES, J. This is an action to recover for personal injuries caused by the kick of a horse. The wagon to which the horse was attached had stuck in the mud half an hour before the accident, and this horse and another had been unhitched and were feeding out of feed-bags attached to their heads. There was evidence that this horse had been made nervous by the effort to pull the wagon out, and by being brutally beaten, and that he was standing partially on the sidewalk. He was standing at right angles to it, and, as the plaintiff approached,

[1] Law Rep. 1 Ex. 265; Law Rep. 3. H. L. 330.

[2] See Mason *v.* Keeling, 12 Mod. 332.

suddenly whirled round and kicked him. The case is here upon an exception to the refusal to direct a verdict for the defendant. The refusal was right. It used to be said in England, under the rule requiring notice of the habits of an animal, that every dog was entitled to one worry, but it is not universally true that every horse is entitled to one kick. In England, if the horse is a trespasser and kicks another, the kick will enhance the damages without proof that the animal was vicious and that the owner knew it. Lee *v.* Riley, 18 C. B. (N. S.) 722. See Lyons *v.* Merrick, 105 Mass. 71, 76. So, in this Commonwealth, going further, it would seem, than the English law, a kick by a horse wrongfully at large upon the highway can be recovered for without proof that it was vicious. Barnes *v.* Chapin, 4 Allen, 444. Marsland *v.* Murray, 148 Mass. 91. Dickson *v.* McCoy, 39 N. Y. 400, 401. See Cox *v.* Burbidge, 13 C. B. (N. S.) 430. The same law naturally would be applied to a horse upon a sidewalk where it ought not to be (see Mercer *v.* Corbin, 117 Ind. 450, 454), and in this case there was evidence of the further fact that the horse was in an exceptionally nervous condition in consequence of the driver's treatment.

Exceptions overruled.

358 142

WILLIAMS *v.* BRENNAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1912.

[*Reported* 213 *Mass.* 28.]

LORING, J. This is an action under R. L. c. 102, § 146, to recover double damages for injury done by the defendant's dog to the plaintiff's automobile. The presiding judge, [*Quinn*, J.] refused to direct a verdict for the defendant and the case is here on an exception to that ruling.

It appeared that as the plaintiff was driving his automobile on the right-hand side of a public way at the rate of some fifteen miles an hour, and as an ice wagon with a single heavy horse was being driven slowly in the opposite direction on the other side of the road, the defendant's dog was seen to "go" into the way some thirty or forty feet ahead of the plaintiff. The dog, which was a large one weighing one hundred and thirty-five pounds, ran toward the plaintiff's automobile, barking as he ran; when he reached the automobile he snapped at the right fore tire, but missed it, and his body struck the left fore wheel; this caused the automobile to skid to the other side of the road so that "the automobile, still in contact with the dog, came directly in front of the" horse of the ice wagon. "The dog did not touch the horse, but when the automobile came in front of the horse as aforesaid, the horse reared and descended upon the top of the automobile, causing injuries

to it for which this action is brought." The only contention made by the defendant is that on this evidence the jury were not warranted in finding that the dog was the sole, direct, and proximate cause of the injury. Denison v. Lincoln, 131 Mass. 236, is decisive against that contention.

Exceptions overruled.

SECTION III.

The "Civil Damage" Act.

KRACH v. HEILMAN.

SUPREME COURT OF INDIANA, 1876.

[*Reported* 53 *Ind.* 517.]

WORDEN, C. J. Complaint by the appellee against the appellants in two paragraphs. Demurrer to each paragraph for want of sufficient facts overruled, and exception. Issue, trial by jury, verdict, and judgment for plaintiff.[1]

The substance of the case made by both paragraphs is, that the defendants furnished the deceased with intoxicating liquor, until he became drunk and insensible and unable to take care of himself; that in going home, lying down in his wagon in consequence of his intoxication, he received the injury from the barrel of salt, which injury he would not have received but for having been intoxicated, and from which injury he died.

One of the objections made to the complaint, passing over others, is, in our judgment, fatal to both paragraphs. The rule of law is, that the immediate, and not the remote, cause of any event is regarded. We have seen that if the plaintiff is entitled to recover, it is because she was injured "in consequence of the intoxication" of the deceased. The immediate cause of the injury to the plaintiff was the death of the deceased. The remote cause may have been his intoxication, which led to his injuries, which injuries, in their turn, led to his death. The plaintiff, therefore, was not immediately injured by the intoxication of the deceased.

The rule of law above stated is well enough settled. The difficulty that usually arises is in its application. It is sometimes difficult to determine what is the remote, and what the proximate cause of an event. But no difficulty of that sort arises in the present case. Here, according to the allegations, it is clear that the intoxication of the deceased was only the remote cause of the injury to the plaintiff, while his death was the immediate cause of such injury. For such

[1] The complaint is omitted. — ED.

injury, we think, on principle and well-considered authority, the statute does not render the defendants liable to the plaintiff.[1]

The defendants, in causing the intoxication of the deceased, could not have anticipated that on his way home he would be fatally injured by the salt-barrel. That was an extraordinary and fortuitous event, not naturally resulting from the intoxication. Suppose, by way of illustration, that a person, by reason of intoxication, lies down under a tree, and a storm blows a limb down upon him and kills him, or that lightning strikes the tree and kills him. Could it be said, in a legal sense, that his death was caused by intoxication? In the chain of causation, the intoxication may have been the remote cause of his death, because, if he had not been intoxicated, he would not have placed himself in that position, and therefore would not have been struck by the limb or lightning. In the case supposed, it may be assumed as clear, that the parties causing the intoxication would not be liable, under the statute, to the widow, as for an injury to her caused by the intoxication of the deceased. Yet there is no substantial difference between the case supposed and the real case here. See, on the subject of remote and proximate causation, the case of Kelley v. The State, 53 Ind. 311; also, Durham v. Musselman, 2 Blackf. 96.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to sustain the demurrer to each paragraph of the complaint.

3607 12

MEAD v. STRATTON.

COURT OF APPEALS, NEW YORK, 1882.

[*Reported* 87 *N. Y.* 493.]

MILLER, J. This action was brought by the plaintiff, who was the wife of Charles Mead, deceased, to recover damages sustained in her means of support by the death of her husband in consequence of intoxication produced by liquor sold to him by said defendant Isaac J. Stratton, at the hotel kept by him, of which the said Margaret M. Stratton, the wife of said Isaac J. Stratton, was the owner; and which, it is claimed, she rented to her husband, or permitted to be occupied as a hotel, knowing that intoxicating liquors were to be and had been sold upon said premises.

The complaint alleges that in consequence of the acts of the defendants stated and set forth, and in consequence of the intoxication of the late husband of plaintiff, caused as aforesaid, plaintiff had been injured in her means of support and property.

[1] The court here considered the following cases: Tisdale v. Norton, 8 Met. 388; Marble v. Worcester, 4 Gray, 395; Crain v. Petrie, 6 Hill, 522; Ryan v. New York Central R.R., 35 N. Y. 210; Fairbanks v. Kerr, 70 Pa. 86. — ED.

The essential facts established by the verdict were that the defendant Isaac J. Stratton was the keeper of the hotel, and the deed was given to his wife who had general charge of the house, except the bar, but was cognizant of the fact that intoxicating liquors were sold there; that the deceased came to the house with a horse and buggy, drank intoxicating liquors several times there, and became so much intoxicated that he was helped into his buggy upon starting for home; that he must have fallen in his buggy, as he was found dead, with his knee caught tightly under the iron cross or foot bar, and his head over between the wheel and the wagon, so that his head was beaten by the spokes and otherwise injured; and that he left a wife and several children who were dependent upon him for support.

The statute (chap. 646, Laws of 1873) under which this action is brought provides, that every husband, wife, etc., "or other person who shall be injured in person or property or means of support by any intoxicated person, or in consequence of the intoxication . . . shall have a right of action in his or her name against the person who shall, by selling or giving away the intoxicating liquors, cause the intoxication . . . and any person or persons owning or renting, or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, shall be liable, severally or jointly with the person or persons selling . . . for all damages sustained and for exemplary damages." The statute cited provides for a recovery by action for injuries to person or property, or means of support, without any restriction whatever. Both direct and consequential injuries are included, and it was evidently intended to create a cause of action unknown to the common law, and a new ground and right of action. (Volans *v.* Owen, 74 N. Y. 526.) The injury to the means of support was one of the main grounds of the action, and when the party is deprived of the usual means of maintenance, which he or she was accustomed to enjoy previously, by or in consequence of the intoxication or the acts of the person intoxicated, the action can be maintained. (Id.) It is evident that the legislature intended to go in such a case far beyond anything known to the common law, and to provide a remedy for injuries occasioned by one who was instrumental in producing, or who caused such intoxication. While a statute of this character should not be enlarged, it should be interpreted, where the language is clear and explicit, according to its true intent and meaning, having in view the evil to be remedied and the object to be attained. The evident object was to suppress the sale and use of intoxicating liquors, and to punish those who, in any form, furnished means of intoxication, by making them liable for damages which might arise, which were caused by the parties who furnished such means. If the injury which had resulted to the deceased in consequence of his intoxication had disabled him for life, or to such an extent as to incapacitate him for labor and for earning a support for his family, it would no

doubt be embraced within the meaning and intent of the statute. That death ensued in consequence thereof, furnishes much stronger ground for a claim for a loss of means of support; and a different rule in the latter case would make provision for the lesser and temporary injury, while that which was greatest and most serious would be without any remedy or means of redress. Such could not have been the intention of the lawmakers, and the statute was designed to embrace and must manifestly cover and include all injuries produced by the intoxication, and which legitimately result from the same. If it is an injury which can be repaired by damages, as that arising from a temporary disability, or one where death comes as a natural and legitimate consequence of the intoxication, a case is made out within the statute which entitles the injured party to recover such damages. The argument that in this case it was the remote cause, and not the natural and proximate cause of the act of the defendant, would apply with equal force if death had not followed, and, we think, has no point under the peculiar circumstances of this case.

There are some decisions in the Supreme Court of this State which bear upon the subject. In Hayes *v.* Phelan (4 Hun, 733) the opinion holds that the statute gave a right of action only in cases where it lies against the intoxicated person. This conclusion does not, however, appear to have been sustained by a majority of the judges constituting the General Term, and in a note to Dubois *v.* Miller (5 Hun, 335) an opinion of *James*, J., is published, dissenting from the views expressed in Hayes *v.* Phelan, and it is stated that *Boardman*, J., concurred only in the result arrived at in the decision, and only two justices were present. In Brookmire *v.* Monaghan (15 Hun, 16), where the complaint asked damages only by reason of the death of plaintiff's husband, which, it was alleged, was caused by intoxication by liquor sold to the deceased by the defendant, it was held that the complaint did not state a cause of action under the Civil Damage Act, and it was said that the court had heretofore decided, in Hayes *v.* Phelan, that such damages are not recoverable under the act of 1873. The same question arose in the fourth judicial department in Jackson *v.* Brookins (5 Hun, 530); and it was there held, that where several persons became intoxicated, and engaged in an affray in which one is killed, his widow may maintain an action against the person who sold the liquor which caused the intoxication, to recover damages sustained by her for the death of the husband. The same doctrine is upheld in Smith *v.* Reynolds (8 Hun, 128). In Quain *v.* Russell (8 id. 319), in the third department, it was held by a majority of the court, that it was not essential to the existence of the cause of action, under the Civil Damage Act, against the vendor of liquors, that an action should also be maintainable against the intoxicated person, and it is sufficient if the wife has been injured in her means of support through the intoxication of the husband. The case of Hayes *v.* Phelan is referred to, and it is said that no such prin-

ciple as is claimed in the last case was decided by the court. It will thus be seen that the decisions of the Supreme Court in this State are not entirely harmonious. In the State of Illinois it is held that the action will lie when death ensues. (See Schroder *v.* Crawford, 94 Ill. 357; Hackett *v.* Smelsley, 77 id. 109.) The same rule is upheld in Nebraska (Roose *v.* Perkins, 9 Neb. 304), and in the State of Iowa (Rafferty *v.* Buckman, 46 Iowa, 195). Some exceptions are made by the courts of Illinois when the person intoxicated is killed in an affray or when death results from exposure. (Shugart *v.* Egan, 83 Ill. 56; Schmidt *v.* Mitchell, 84 id. 195.) It is not necessary to decide whether these decisions are based on a sound principle, as no such question arises in the case at bar. Cases are also cited from Indiana, which are claimed to be adverse to the views expressed. (See Krach *v.* Heilman, 53 Ind. 517; Collier *v.* Early, 54 id. 559; Backes *v.* Dant, 55 id. 181.) In Krach *v.* Heilman (*supra*), the person intoxicated was killed in an affray. The last two cases cited are somewhat analogous to the case at bar, but the decision of the court is not, we think, well supported in either of them. It is also held in Ohio, that under the act in that State in relation to the sale of intoxicating liquors for injury to the means of support in consequence of intoxication which caused death, no recovery of damages can be had. (Davis *v.* Justice, 31 Ohio, 359; Kirchner *v.* Myers, 35 id. 85.) We cannot concur in such an interpretation of the act in question, and for the reasons already stated are of the opinion, that, if the death of the deceased was a result necessarily following the intoxication, and was attributable to such intoxication, an action will lie to recover the damages arising to the means of support of the plaintiff by reason thereof. While thus holding, it is not necessary to decide whether a person producing the intoxication would be liable when death ensued by reason of an affray caused thereby, or under different circumstances from those which are presented in the case at bar. Nor are we called upon to consider in this case the effect of the statute so far as it affects the right of action of the children of the deceased for damages sustained by each of them, as that question is not now presented. The conclusion follows, that there was no error committed by the judge upon the trial in any of his rulings in regard to the question considered. A claim is also made, that the judge erred in refusing to dismiss the complaint, or to nonsuit the plaintiff as to the defendant Margaret M. Stratton. The title to the hotel was in her, and she lived there with her husband, having charge of the domestic arrangements in conducting the business of the hotel. There is evidence tending to show that she had knowledge that her husband was engaged in the business of selling intoxicating liquors, and that he intended to, and did actually, carry on and prosecute such business. Under the evidence it was a question of fact for the jury to determine, whether she had knowledge that the building was occupied and used by her husband for any such purpose. And this result was to be arrived at after a due

consideration of the relations existing between the husband and his wife, and the circumstances surrounding the case."[1] . . .

It is not important, we think, to consider whether the strict relation of landlord and tenant existed, if Mrs. Stratton was the owner, and permitted her husband to occupy with the knowledge of the business in which he was engaged of selling intoxicating liquors. There was no error in any portion of the charge to which exceptions were taken, or in the refusal to charge as requested, or in any other of the rulings on the trial.

The judgment was right, and should be affirmed.

All concur, except RAPALLO, J., taking no part.

Judgment affirmed.

3647 12

NEU v. McKECHNIE.

COURT OF APPEALS, NEW YORK, 1884.

[*Reported* 95 *N. Y.* 632.]

DANFORTH, J. The act entitled "An act to suppress intemperance, pauperism and crime" (Chap. 646, Laws of 1873), provides in substance that certain persons, and among others, a "child," who shall be injured in means of support by any intoxicated person, or in consequence of the intoxication of any person, shall have a right of action against any person who, "by selling . . . intoxicating liquors, caused the intoxication in whole or in part," and may recover from such vendor all damages so sustained, and also exemplary damages.

This action is brought under that act. The verdict of the jury establishes that the plaintiff at the time the alleged cause of action accrued was a child of the age of fifteen years, the son of Jacob and Barbara Neu; that he was living with his parents and dependent upon his father for support, when the latter, in a state of intoxication, produced in part by the use of lager beer, sold to him by the defendants, murdered plaintiff's mother and then committed suicide. Upon all these questions there was evidence proper for submission to the jury, and their finding in regard to them has not been disturbed by the General Term. Their conclusion is not open to review here.

The learned counsel for the appellants, however, argues with much earnestness that the act which deprived the plaintiff of his father and cut off the support which he had before enjoyed was not a natural consequence of the use of the beer sold by the defendants; that they were not bound to know that Jacob Neu "would strike his wife on the head with an axe, and then cut his own throat with a razor." Perhaps not. But a cause of action may exist without such foresight. The statute does not even require that the vendor shall know that drunken-

[1] The discussion of this point is omitted. — ED.

ness leads to crime of any degree, nor even that it is the cause of poverty and beggary, and consequent distress to the drunkard's family. It is enough that these results come from intoxication, and so in Hill *v.* Berry, 75 N. Y. 229, a wife recovered of the landlord and his tenant because by reason of liquors sold by the latter her husband became intoxicated, wasted his money, neglected his employment, and became incompetent to labor, and, therefore, unable to provide for her, and she was obliged to care for him while in that condition. She suffered not only because his substance was reduced to nothing, but from the loss of productive labor. In Bertholf *v.* O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323, the landlord was required to pay for the plaintiff's horse, because it died from overdriving induced by the driver's intoxication through liquors sold by the defendant's lessee. In Mead *v.* Stratton, 87 N. Y. 493, 41 Am. Rep. 386, the wife recovered under this act, because the husband, while intoxicated by liquors sold on the defendant's premises, was beaten to death by the wheel of his own wagon while the reins were in his hand, although he was in a state of stupor.

In those cases, as well as in others arising under the act, liability was established from the sale of liquors producing intoxication, and the act of the intoxicated person causing injury to the plaintiff in his person, property, or means of support. Those elements exist here. The cause of action is neither taken away nor mitigated because the cause of injury also constitutes a crime. The jury were not to inquire whether either "the homicide or suicide were the natural, reasonable, or probable consequences of the defendants' act." It is enough if while intoxicated in whole or in part by liquors sold by the defendants, those acts were committed, if by reason of them, or either of them, the plaintiff's means of support were affected to his injury.[1]

365-742

DENNISON *v.* VAN WORMER.

SUPREME COURT OF MICHIGAN, 1895.

[*Reported* 107 *Mich.* 461.]

MCGRATH, C. J. This is case against a saloon keeper and his bondsmen. The declaration alleges that the sale occurred on Sunday; that plaintiff's husband was intoxicated at the time of the sale, and was in the habit of getting intoxicated, to defendant Van Wormer's knowledge; that he drank the liquor sold to him, and became more intoxicated; that while so intoxicated, and being thereby deprived of his reason, he committed the crime of burglary, by breaking and entering a certain store in the night-time, for which crime he was arrested, tried, and

[1] The remainder of the opinion discusses another question. — ED.

convicted, and sentenced to the house of correction for the term of three years. It appeared upon the trial that the husband had previously committed like offenses, and had served time in Detroit and Cleveland for two of them. The jury returned a verdict of no cause of action.[1]

The language of the statute (3 How. Stat. § 2283 *e* 3) is:

"Every wife, child, parent, guardian, husband, or other person who shall be injured in person or property or means of support or otherwise by any intoxicated person, or by reason of the intoxication of any person, or by reason of the selling, giving, or furnishing any spirituous, intoxicating, fermented, or malt liquors to any person, shall have a right of action in his or her own name against any person or persons who shall, by selling or giving any intoxicating or malt liquor, have caused or contributed to the intoxication of such person or persons, or who have caused or contributed to such injury."

This statute clearly refers to such injuries to persons, property, or means of support as are the direct results of the acts done while intoxicated, and to such other injuries as indirectly result by reason of the intoxication. In Brockway *v.* Patterson, 72 Mich. 122, Lane and Brockway were both intoxicated, and quarreled, Lane striking Brockway and causing his death. In Thomas *v.* Dansby, 74 Mich. 398, Thomas and Free were both intoxicated, and the former's leg was broken by the latter. In Wright *v.* Treat, 83 Mich. 110, the buggy in which plaintiff was riding was overturned, and plaintiff was injured, by a collision with a vehicle driven by Wells and Shafer, who were intoxicated and were recklessly driving. In Doty *v.* Postal, 87 Mich. 143, plaintiff's husband was killed by an intoxicated person. In Eddy *v.* Courtright, 91 Mich. 264, plaintiff's adult son was drowned while intoxicated. In Neu *v.* McKechnie, 95 N. Y. 632, plaintiff's father killed the former's mother and then himself while intoxicated. In these cases the act done injured plaintiff's person, or took from plaintiff the means of support. In the present case, plaintiff's husband was not injured or killed by an intoxicated person, nor did the act done by him cut off her support. The act done was not a direct blow at her person, property, or means of support. It was his arrest, conviction, and sentence which deprived her of his aid. And, too, a felonious intent was an essential ingredient of the crime for which he was convicted.

Whether that conviction was or was not conclusive, it is unnecessary here to determine. The trial court submitted the question to the jury under instructions most favorable to plaintiff.

[1] Part of the opinion is omitted. — Ed.

3 67 Z+2

GAGE v. HARVEY.

SUPREME COURT OF ARKANSAS, 1898.

[*Reported* 66 *Ark.* 68.]

BATTLE, J. The question in this case is, can one who becomes intoxicated upon liquor sold to him in a saloon or dram-shop by the keeper thereof or his agents, and thereby incapacitated to hold and take care of his money, and who, while in that condition, loses it by having it forcibly or without his knowledge or consent taken from his pockets by some person, maintain an action against the keeper and the sureties on his bond to recover the money so taken?

This question arises under section 4870 of Sandels & Hill's Digest, which provides: "Each applicant for a dram-shop or drinking saloon license . . . shall enter into bond to the State of Arkansas, in the penal sum of two thousand dollars, conditioned that such applicant will pay all damages that may be occasioned by reason of liquor sold at his house of business, . . . which bond shall have two good securities thereto, to be approved of by the court;" and under section 4873 which reads as follows: "Any person aggrieved by the keeping of said dram-shop or drinking saloon . . . may have an action on said bond against the principal and securities for the recovery thereof."

The answer to the question obviously depends upon the meaning of the words, "conditioned that such applicant will pay all damages that may be occasioned by reason of liquor sold at his house of business," which are used in section 4870. They should be construed according to the general rule fixing the limit of the liability of parties for the consequences of their acts in other cases, as they in no way indicate an intent to make the liability of the saloon keeper an exception to such rule. According to their legal effect, they bind him to pay all damages that may be the natural and proximate result of the use or consumption of liquor sold by him or his agents at his place of business. Further than this the law does not extend the liability on his bond on account of the sale of liquor. As said by Lord Bacon: "It were infinite for the law to consider the cause of causes, and their impulsion one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." Bacon's Maxims, Reg. 1; Broom's Legal Maxims, 165.

The material inquiry in this case is, therefore, whether the use or consumption of the liquor sold by the keeper or his agents at his place of business was the proximate cause of the loss of the money mentioned in the question propounded.

In determining whether an act of a defendant is the proximate cause of an injury, the rule is that the injury must be the natural and prob-

able consequence of the act — such a consequence, under the surrounding circumstances of the case, as might and ought to have been foreseen by the defendant as likely to flow from his act; the act must, in a natural and continuous sequence, unbroken by any new cause, operate as an efficient cause of the injury. If a third person intervenes between the act of the defendant and the injury, and does a culpable act, for which he is legally responsible, which produces the injury, and without it the injury would not have occurred, and the act of the defendant furnished merely an occasion for the injury, but not an efficient cause, the defendant would not be liable. For no one is responsible for the independent wrong of a responsible person to whom he sustains no relation which makes him liable for his wrong independent of an actual participation therein or connection therewith, as, for instance, the master for the acts of the servant in the scope, course, or range of his employment.

Mr. Wharton states the doctrine in question and answer as follows: "Supposing that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative; for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject-matter as to which I am not contractually bound. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is liable to the person injured." Wharton, Negligence, § 134, *et seq.*

We will give a few illustrations of the rule stated, beginning with Alexander *v.* Town of New Castle, 17 N. E. Rep. 200, in which a town was sued for injuries alleged to have been caused by a pit or excavation in a street, which the town wrongfully and negligently suffered and permitted to remain open and uninclosed. The plaintiff was a special constable, and was thrown into the pit by a prisoner he had under arrest, as they were passing and opposite the pit, and was injured, the prisoner escaping. It was insisted that, as the pit or excavation, so wrongfully and negligently permitted to remain open and uninclosed, afforded the prisoner the opportunity of throwing the plaintiff into it, as a means of escape, it was, in legal contemplation, the proximate cause of the injuries which the plaintiff received. But the court held that the prisoner was clearly an intervening as well as an independent human agency in the infliction of the injuries of which the plaintiff complained, and that the town was not liable. In that case the pit afforded the opportunity to inflict the injury, but was not an efficient cause of it.

In Vicars v. Wilcocks, 8 East, 1, the plaintiff sued the defendant for slander, which was uttered in a conversation with persons who were not his employers, but was communicated to his master, and attempted to hold him liable for the damage he suffered by reason of his master discharging him, in consequence of the slander, before the expiration of his term of service. And Lord Ellenborough said that the special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration; and here it was an illegal consequence, a mere wrongful act of the master for which the defendant was no more answerable than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff, and thrown him into a horse pond by way of punishment for his supposed transgression. And his lordship asked whether any case could be mentioned of an action of this sort sustained by proof only of an injury sustained by the tortious act of a third person. Cuff v. Newark & N. Y. R. Co., 35 N. J. L. 31.

In Shugart v. Egan, 83 Ill. 56, the plaintiff's husband, while in a state of intoxication caused by liquors obtained by him from the defendant, insulted or menaced one McGraw, who thereupon stabbed him, inflicting a wound whereof he died shortly afterwards. The court held that the plaintiff was not entitled to recover under a statute which gave a wife "who shall be injured in person, property or means of support" in consequence of the intoxication of any person "a right of action against the person who caused the intoxication, and made such person liable for all damages sustained and for exemplary damages." Mr. Justice Scholfield, for the court, said: "It has also been held that the intervention of the independent act of a third person between the wrong complained of and the injury sustained, which was the direct or immediate cause of the injury, breaks the causal connection; and, consequently, there can, in such case, be no recovery except as against the person whose immediate agency produced the injury. . . . Here, the death not resulting from intoxication or from any disease induced or aggravated by the use of liquor, but solely from the direct and wilful act of McGraw, we have a case clearly within this principle."

In the case before us the intervening act produced the injury complained of, and was the wrongful act of a third person for which he was legally responsible. The sale and consumption of the liquor may have furnished the opportunity or occasion for the wrongful act of the third person, but was not the proximate cause of the injury. Hence the saloon keeper, who sold the liquor which produced the intoxication, and the sureties on his bond, are not liable for damages. Cuff v. Newark & N. Y. R. Co., 35 N. J. L. 17.

The judgment of the circuit court is reversed as to George Sargianovich, the keeper of the saloon, and J. Kempner and D. Beffa, the sureties on his bond, and is affirmed as to Vincent Gage.

37022

ROACH v. KELLY.

SUPREME COURT OF PENNSYLVANIA, 1899.

[*Reported* 194 *Pa.* 24.]

DEAN, J.[1] . . . There are many cases where the question of remote or proximate cause is for the jury, but this is not one of them. The facts are undisputed; deceased had an old grudge against Atkinson; when heated by liquor he revived the old quarrel; in gratification of his ill will he also picked a quarrel with Pratt, the father-in-law of the man he hated; they proceeded some distance to private property and fought; Roach defeated Pratt, then attacked Atkinson; while engaged in this second flagrant breach of the peace the cry of police is raised, and all, both the drunk and sober, fled; Roach, by the concurring circumstances of the slip on the bank and the fall into the open sewer, was killed. Admit that his resentment on account of the old grudge and his quarrelsomeness were prompted by the liquor and resulted in the fight; he received no injury in that consequence of defendant's act; the direct effect of the liquor ended with the fight; in a subsequent attempt, however, to escape arrest for a violation of law he met his death; this was an intermediate cause, disconnected from the primary one, for which, under no view of the facts, was defendant responsible. If Roach in his flight had been arrested by the officers, and in a scuffle to escape from them had met his death, it might as well have been argued the proximate cause of his death was the unlawful sale of liquor, yet it is too plain for argument that the resistance to the officers was the proximate and effective intervening cause, while at most the sale of liquor was the very remote cause.[2]

The statute on which this suit is founded imposes no higher degree of responsibility on the liquor dealer than the common law imposes upon wrongdoers. It declares he "shall be held civilly responsible for any injury to person or property in consequence of such furnishing." The criminal law imposes punishment without regard to the consequences; the civil law damages only for the natural and probable consequences of the act. It might be plausibly argued that defendant ought to have so far foreseen as the natural and probable consequences of his act, that Roach might have a deadly fall on the highway when going to his home, or that his death might result from being run down by cars while crossing a railroad track, or by falling into water and drowning, or possibly by exciting his quarrelsome disposition his death might have come from a blow inflicted by some insulted antagonist,

[1] Part of the opinion is omitted. — ED.

[2] The court here quoted from the following cases: Hoag v. R. R., 85 Pa. 293; Morrison v. Davis, 20 Pa. 171. — ED.

but that he should quarrel with Pratt, proceed deliberately through a tunnel to a private lot on the opposite side of a railway, leisurely cast off his clothing, fight with Pratt and beat him, then engage with Atkinson, then, in terror of the law which he had violated, flee from the officers, slip down the steep bank he was striving to climb, fall into an open sewer hole negligently unguarded on a private lot, and thus break his neck, surely this was neither the natural nor probable consequence of giving him drink. The alleged cause is so remote from the injury that the learned judge ought to have said peremptorily that there could be no recovery.

The judgment is reversed and judgment is entered for defendant.

CURRIER v. McKEE. 371 Lt 2

SUPREME JUDICIAL COURT OF MAINE, 1904.

[*Reported* 99 *Me.* 364.]

POWERS, J. This is an action under the civil damage act, and comes to the law court on exceptions to the ruling of the presiding justice directing a nonsuit.

There was evidence tending to prove that the plaintiff lived with her son, Will A. Currier, aged thirty-four, upon his farm and was dependent upon him for her support; that the defendant sold intoxicating liquor to the son which caused his intoxication; that while so intoxicated he entered the store of one Boulier who ordered him out of the store; that he went out but turned and tried to come back with the intention of striking at Boulier and having a fight with him; that he did strike at Boulier, who thereupon struck him and broke his jaw, by reason whereof his ability to labor was decreased and the support which he afforded his mother sensibly diminished.

The defendant contends that no recovery can be had except for those injuries of which the intoxication is the proximate cause; that the independent act of an intelligent and responsible human being intervened and caused the broken jaw from which all damage to the plaintiff resulted, and that the intoxication was therefore the remote, and not the proximate cause of the injury.

R. S. 1883, c. 27, § 49, — now R. S. 1903, c. 29, § 58, — creates a new cause of action unknown to the common law, and so far as is material reads as follows: "Every wife, child, parent, guardian, husband, or other person who is injured in person, property, means of support or otherwise, by any intoxicated person, or by reason of the intoxication of any person, has a right of action in his own name against anyone who by selling or giving any intoxicating liquors, or otherwise, has caused or contributed to the intoxication of such per-

sons." The statute is aimed at the suppression of a great evil, and while no effort should be made by a forced interpretation to extend its meaning beyond what was fairly intended, it should be liberally construed so as to effect the beneficent purpose for which it was enacted. In its terms it is very broad. It is not confined to unlawful sales as was the original act of 1858, c. 33, § 11, R. S. 1871, c. 27, § 32, which was repealed by the public laws of 1872, c. 63, § 4, and the present statute substituted. The giver equally with the seller is made liable for the injurious consequences of his act. It is not necessary that the intoxicating liquor furnished by the person sued should have been the sole cause of the intoxication; it is sufficient if it "contributed" to it in an appreciable degree. A right of recovery is given for injuries produced in two ways, first, "by any intoxicated person," and second, "by reason of the intoxication of any person." When the injury is caused by an intoxicated person, it need not be shown that the intoxication caused the injurious act. In such case it is sufficient if while in a state of intoxication, to which liquors furnished by the defendant contributed, such intoxicated person commits the act which results in injury to the "person, property, means of support or otherwise" of the plaintiff. The furnishing by the defendant of the intoxicating liquor must have contributed as a proximate cause to the intoxication, and the act of the intoxicated person must have been the cause of the injury, but it is not necessary that the intoxication should have been the proximate cause of injury or of the act which caused it. Neu *v.* McKechnie *et al.*, 95 N. Y. 632; Brockway *v.* Patterson, 72 Mich. 122. The legislature seems to have regarded intoxicating liquor as dangerous to society, and to have intended that whoever by furnishing liquor contributed to the intoxication of any person should be held responsible for injuries inflicted by him while in that condition, without placing upon the sufferer the burden of showing that the injury was due to the intoxication.

This, however, is but to show the scope of the statute and that it should be construed in no narrow or illiberal spirit. The plaintiff claims that she was injured in her means of support not by an intoxicated person, but "by reason of the intoxication" of her son.

If this provision is to be regarded as calling for the same sequence and connection of causation required by the maxim of the common law which the defendant invokes, that the law looks to the proximate and not to the remote cause, the oft embarrassing question remains of what is a proximate and effective although not the immediate cause of the injury. Giving to the defendant the full benefit of the application of the principle which he claims, still the statute does not require that the furnishing of the liquor by the defendant should be the proximate cause of the plaintiff's injury, but only that it should have contributed to her son's intoxication and that the intoxication should have been the proximate cause of the injury. It is urged

that the act of an intelligent and responsible human being, the blow struck by Boulier, intervened between the intoxication of the son and the resulting injury to the plaintiff. Upon the evidence, however, the jury might have found that the illegal sales of intoxicating liquor by the defendant to the plaintiff's son caused his intoxication, and that his intoxication caused him to make an assault upon Boulier, and that the blow of the latter was solely in self defense when struck at by the intoxicated son. If so, the intervention of Boulier was rightful. It is the wrongful or negligent act of a third party intervening which breaks the chain of causation and relieves the original wrongdoer of the consequences of his wrongful act; but if in the right he is not responsible and the party injured must seek reparation from him whose wrongful act was the first in the order of events causing the injury.

A reference to some of the authorities will show that this principle has been frequently recognized ever since the squib case, Scott *v.* Shepard, 3 Wilson, 403, and also the liberal manner in which statutes, giving a right of recovery for injuries to person, property, or means of support "in consequence of" or "by reason of the intoxication of any person," have been construed.

It is a principle of law, applicable to the doctrine of proximate cause, that "if the original act was wrongful and would naturally according to the ordinary course of events prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which are innocent. But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as a proximate cause, and not to that which is more remote." Cooley on Torts, page 76.

The plaintiff's son was struck by a railroad train while walking upon the track in an intoxicated condition. It was held that, the railroad company not being in fault, the intoxication might be found to be the proximate cause of the injury. "Men are held liable every day in tort for the natural and proximate results of their wrongs, although the particular result could not be foreseen as necessary at the time of the act." McNary *v.* Blackburn, 180 Mass. 141.

In Gage *v.* Harvey, 66 Ark. 68, 74 Am. St. R. 70, an intoxicated person was robbed of his money, and the person selling the liquor was held not liable. "The intervening act produced the injury complained of, and was the wrongful act of a third person for which he was legally responsible."

In Schmidt *v.* Mitchell, 84 Ill. 195, it was held that if a person in consequence of intoxication should get into a difficulty resulting in his being shot in the thigh, the party selling the liquor might be responsible for the direct consequences of the injury received, but that if, after becoming sober, his disregard of his physician's instruc-

tions should necessitate the amputation of his leg, the liquor seller would not be responsible for the loss of life. There the wound was lawfully inflicted by one Freidenback in defense of his house. Shugart v. Egan, 83 Ill. 56, is sometimes cited in support of a contrary doctrine. There, however, the plaintiff's husband, in consequence of mere words used by him while intoxicated, was assaulted and slain by one McGraw. It is evident that mere words would not justify the assault and that McGraw was a wrongdoer. The same court, commenting upon Shugart v. Egan, in a later case, said: "It was there said to be the common experience of mankind that the condition of one intoxicated invited protection against violence rather than attack, and that it was not a natural and probable result of intoxication that the person intoxicated should come to his death by the wilful criminal act of a third party. . . . It was not the intention that the intoxicating liquor alone, of itself exclusive of other agency, should do the whole injury. That would fall quite short of the measure of remedy intended to be given. The statute was designed for a practical end, to give a substantial remedy, and should be allowed to have effect according to its natural and obvious meaning." Schroden v. Crawford, 94 Ill. 357. Intoxication was held to be the proximate cause of death when a person was drowned in bathing. Meyer v. Butterbrodt, 146 Ill. 131. The party causing intoxication cannot escape liability because he may not reasonably have foreseen the consequences. Roth v. Eppy, 80 Ill. 283, a case of insanity caused by habitual intoxication. Plaintiff's husband while intoxicated made an assault upon one Morceau by whom he was killed. Held that defendant would be liable on account of the sale and intoxication resulting from such sale if such intoxication was the effective cause of the injury. Baker & Reddick v. Summers, 201 Ill. 52.

The leg of plaintiff's husband was broken by one Free, in a drunken scuffle. Both the husband and Free were intoxicated at the time by liquor sold by the defendant. In affirming a verdict for the plaintiff, the court said: "If the injury was occasioned by reason of the intoxication of Thomas or Free, and such intoxication was produced, in whole or in part, by the liquors sold by the defendant Dansby, then the case would fall within the terms of the statute, and a recovery could be had if the plaintiff by reason thereof was injured in her means of support." Thomas v. Dansby, 74 Mich. 398. A conviction of drunkenness has been held a proximate result of intoxication such as will render the one furnishing the liquor liable to the wife for injuries resulting therefrom. Lucher v. Liske, 111 Mich. 683.

The question of proximate cause is for the jury under appropriate instructions of law. One is not bound to anticipate what is merely possible, nor on the other hand is he liable for such consequences only as usually follow. It is sufficient if the result ought to have been apprehended according to the usual experience of mankind.

The defendant need not have intended that the plaintiff's son should make an assault upon Boulier or even have expected it or the injury which followed. Enough if according to human experience it was to be apprehended that such results were likely to happen from the intoxication. The legislature deals with intoxicating liquor upon the assumption that it is the enemy of society, that intoxication weakens the will, disturbs the judgment, saps the moral forces, and is the fruitful source of vice and crime attended by personal injury and loss. It is natural as well as lawful that one assaulted should use reasonable force to repel the assailant even to his personal injury. It is for the jury to say who is the assailant, and whether, under the circumstances, the force used was reasonable and appropriate. It is also for them to determine whether one, who lets loose such a dangerous agent as intoxicating liquor, is not bound to apprehend that the intoxication thereby produced is likely to cause unjustifiable assaults and consequent injury to the assailant.

In the case at bar there was evidence tending to show that the intoxicating liquor sold by the defendant caused the intoxication of the plaintiff's son, that by reason of such intoxication he made an assault upon Boulier, and that the latter acting in self defense struck the blow which diminished the son's capacity to labor, resulting in injury to the plaintiff's means of support. If these issues are found in the affirmative, then, under the broad and sweeping provisions of the statute we are considering, we think it may be said that the plaintiff was injured in her means of support "by reason of the intoxication" of her son. The court cannot say that the intoxication would not then be the "one efficient procuring cause without which the injury would not have happened." Gilman *v.* E. & N. A. Ry. Co., 60 Maine, 235. The case should have been submitted to the jury.

Exceptions sustained.

MINOT *v.* DOHERTY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1909.

[*Reported* 203 *Mass.* 37.]

TORT under R. L. c. 100, § 58, by a married woman against the proprietor of a bar room for personal injuries, resulting in an alleged miscarriage, from an assault upon the plaintiff by her husband in consequence of intoxication caused by liquor sold to him by the defendant. Writ dated November 8, 1905.

In the Superior Court the case was tried before *Stevens*, J. At the close of the evidence the defendant asked the judge to give certain instructions to the jury, among which were the following:

"8. There is no evidence that the alleged miscarriage was suffered in consequence of the intoxication of the plaintiff's husband caused in whole or in part by liquor sold or given him by the defendant."

"11. The jury cannot consider the plaintiff's pain in labor at the time of the alleged miscarriage as an element of damage, as there is no evidence that such pain was more aggravated than would ultimately and naturally result from her pregnancy."

The judge refused to give these instructions, and submitted the case to the jury with instructions which are described in the opinion.

The jury returned a verdict for the plaintiff in the sum of $1,500; and the defendant alleged exceptions to the judge's refusal to give the eighth and the eleventh instructions requested by the defendant, and to "that portion of the charge relating to the defendant's liability, if the plaintiff's husband was a confirmed and habitual drunkard and his confirmed habits were continued in whole or in part by liquor supplied by the defendant."

LORING, J. 1. The defendant urges in support of his exception to the refusal of the judge to give the eighth ruling asked for that "the defendant would not be liable if an habitual drunkard, to the formation of whose habits of intoxication the defendant had in whole or in part contributed, committed an assault while perfectly sober." That is true. That was decided to be law in Bryant v. Tidgewell, 133 Mass. 86. But it was laid down in that case that if a man who is habitually drunk for a specified period assaults his wife at that time, a defendant who by selling him liquor had caused that drunkenness in whole or in part would be liable if his intoxication at that time was the cause of the assault. That case established the distinction between causing a husband to form habits of drunkenness by selling liquor to him and causing him to be habitually drunk during a specified period by selling liquor to him.

The defendant has also argued that there was no evidence that the husband was in fact intoxicated at the time of the assault. But we are of opinion that from the evidence set forth in the bill of exceptions the jury were warranted in finding that he was intoxicated at that time. Moreover the bill of exceptions does not purport to set forth all the evidence. Further, although the whole charge is not given, it affirmatively appears that the presiding judge instructed the jury that they must find that fact. He told them that he had been asked to give them this instruction: "The burden is upon the plaintiff to show that the intoxication of the husband at the time it is alleged that he struck and injured her was caused in whole or in part by liquors sold or given him by the defendant." As to this he told the jury: "I have already given you that and I repeat it."

2. In explaining to the jury that the defendant would not be liable for habits of intoxication formed by the husband before any liquor

was sold to him by the defendant, the judge said that he would be liable if "those habits were continued afterwards and were continued afterwards on account of the acts of the defendant in selling him liquor in whole or in part." If this had stood alone the charge would have been erroneous for the same reason that the charge in Bryant v. Tidgewell, 133 Mass. 86, was held to be wrong. But this was an inaccurate statement used by the judge in pointing out that the defendant was not liable if the husband had become addicted to drunkenness before any liquor was sold to him by the defendant. When the judge later on in his charge instructed the jury as to what they must find to bring in a verdict for the plaintiff, this inaccuracy was cured. They were then told in substance that they must find that the assault was caused by his being in a state of habitual drunkenness at the time, and that this state of habitual drunkenness had been caused in whole or in part by liquor sold by the defendant.

3. The eleventh request could not be given. The pain in labor of a woman, who by reason of an assault and battery upon her brings forth a dead child when she is seven months gone in pregnancy, may be found to be greater than the pain in labor of a woman "who remembereth no more her anguish for joy that a man is born into the world."

Exceptions overruled.

SECTION IV.

Workmen's Compensation Acts.

377242

BLAKE v. HEAD.

COURT OF APPEAL, 1912.

[*Reported* 5 *B. W. C. C.* 303.]

COZENS-HARDY, M. R. The facts were that the boy went into the service of Head as an errand boy and was told by his father that Head had been in an asylum, and that he was to be a good boy and not make his employer annoyed. When the boy was doing some work under the direction of Mrs. Head, he was attacked by Head with a chopper and was severely injured, sustaining a fractured skull. It was a lamentable affair. Head must be taken to be a sane person, as he had been discharged shortly before from an asylum. It was said the boy could claim compensation because this accident arose out of and in the course of his employment. Personally, I do not think this was an "accident" at all. I think it was an intentional felonious act, and the injury certainly did not arise out of the employment. If the applicant had been an attendant in a lunatic asylum, and had been attacked by one of the

patients, there would have been very good ground for saying that there was an accident arising out of his employment as being a risk incidental to the employment. But that is not the case here. I cannot think why the unfortunate boy did not bring an action for assault. I do not think it was an accident, or that the injury arose out of and in the course of employment.

FLETCHER MOULTON, L. J. I am extremely sorry for the boy; but I agree that the appeal must be dismissed.

BUCKLEY, L. J. A felonious act done by the employer cannot by any possible straining of language be called an accident arising out of and in the course of the employment. I agree in thinking this appeal fails.

Appeal dismissed.

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BUTLER *v.* BURTON-ON-TRENT UNION.

COURT OF APPEAL, 1912.

[*Reported* 5 *B. W. C. C.* 355.]

COZENS-HARDY, M. R. This is an appeal from Judge *Lindley*, who has given us an elaborate judgment. The facts are plain and not in dispute. The deceased man was master of a workhouse. He was on duty continuously until ten o'clock at night, but he had no active duties at the time in question. It was a summer evening. He was sitting smoking at the top of some stairs leading up to that part of the workhouse where his own private rooms were. It is not suggested that there was anything peculiar in these stairs. The labor-master happened to pass that way, and he was having a talk with him about workhouse matters. Unfortunately, the master of the workhouse had tubercular trouble. A fit of coughing came on, and made him giddy. He turned round, and fell down the steps, and it was found that one of his ribs was broken, and he died of pneumonia some days after. The judge has found this was an accident in the course of the employment. The then question is, Did it arise out of the employment? Mr. Parfitt says it "arose out of" because it took place on premises where he was in fact engaged. If that view is right, it makes "in the course of" the sole test. It has been decided that an accident "arising out of" means some risk reasonably incidental to the employment; that the man is more exposed to the particular risk than other persons of the community. Mr. Parfitt admits that if the master had been engaged in his office and this fit of coughing had come on, the accident would be in no sense one arising out of the employment. There is nothing peculiar in the employment which renders the risk greater than that to which ordinary persons are exposed. It is not as though the task was likely to render the cough more frequent and more dan-

gerous. I cannot imagine a quieter occupation than this man had. In these circumstances, I think we should be extending the provisions of this Act beyond all reason, beyond all principle, beyond all authority, if we held that this accident arose out of the employment.

FLETCHER MOULTON, L. J., agreed.

BUCKLEY, L. J. The place was not a dangerous place; the man was neither more nor less liable to fall because he was a workhouse master. These considerations are sufficient. The accident did not arise out of the employment in the sense that it was due to the nature of the employment, or to anything to which the employment required him to expose himself.

Appeal allowed.

3 79 Z f c

EVERITT v. EASTAFF & CO.

COURT OF APPEAL, 1913.

[*Reported* 6 *B. W. C. C.* 184.]

COZENS-HARDY, M. R. This case has been most strenuously argued by Mr. Lort-Williams on behalf of the dependents of the dead man. He certainly has said all that possibly could be said for his clients, but, nevertheless, I cannot bring myself to agree with his contention, for I do not think there is any substance in the appeal. The deceased man was a carter, and the facts as found by the learned judge were in substance these: The man was employed on the day of the accident to take a load of sand in his cart from the Midland Railway depot — which we are told is near the Midland station at Luton — to a place in the Selbourne Road, some little distance away. It was part of his duty after he had got rid of his load to take his horse and cart back to the stables at twelve o'clock, which was the men's dinner hour. He had been with his load to Selbourne Road, but instead of going back to the stables by the way he had come, which was the nearest and reasonable and natural route for him to take, he went where he had no business to go, by a route which was a little way farther round, but which took him back to the stables, passing by the Great Northern Railway station. By this route he passed a public-house called the "Fox Inn," where he stopped. We do not know exactly when he got there. One witness said he saw the cart standing there at 11.30, and another that he noticed the cart there when he passed at 11.40; the publican said that about twelve o'clock the man came into the bar and had one glass of ale, and that he noticed that the horse and cart were standing outside on the draw-up. It was argued by Mr. Lort-Williams that we must not infer from this evidence that the man was there drinking at the public-house all the time. And so far, I agree with him. But

the man seems, however, to have been loitering over his work all that day, for he did only two instead of four journeys that morning, according to his day-sheet. However that may be, we know this, that when he came out of the public-house, after getting his drink, he got up on to the cart and something startled the horse; he began to trot, and then ran away towards his stable. The man, who had the reins in his hands, was thrown out of the cart and killed. The judge found that the route which the man took back from Selbourne Road was not the nearest way the man could take to get back to the stables, and was not the ordinary or usual route there. And he held "that the accident did not arise out of and in the course of the man's employment. That that employment was to cart as alleged; that the deceased went to the Fox Inn for his own purposes; that the accident happened on a road a few yards from the Fox Inn, where his employment did not reasonably or naturally take him with his cart, and upon the evidence I so decide; nor do I think that the getting into the cart again after the Fox Inn visit continued his employment (as Mr. Lort-Williams contended), so as to make the respondents liable."

Now, the very ingenious argument addressed to us on behalf of the appellant was, in effect, this: The deceased man was a carter, and therefore his duty was to take care of his master's horse and cart. However long, therefore, he may have been getting back, if he deviated from the ordinary route on an excursion for his own purpose — if, for example, to use the illustration put by BUCKLEY, L. J., to Mr. Lort-Williams during the argument, the man had gone off to see a football match — so long as he took the horse and cart with him, any accident which happened to him while driving the horse back to the yard would be an accident arising out of and in the course of his employment. It was argued that taking the horse back to the yard was part of his duty, and the accident happened in the performance of that duty, and therefore the employers were liable. I cannot in the least accept that argument as sound. I cannot think that a man is within the protection of the Act when making an excursion solely for his own pleasure. I think it is immaterial to consider whether he remained at the Fox Inn for twenty minutes or half an hour. It did not matter in the least. The man for his own purpose had chosen to take a route home which was unauthorized, and that prevented the accident from arising out of and in the course of the man's employment within the meaning of the Act.

BUCKLEY and HAMILTON, L. JJ., concurred.

Appeal dismissed.

381742

M'LAUCHLAN v. ANDERSON.

COURT OF SESSION, SCOTLAND, 1911.

[*Reported* 4 *B. W. C. C.* 376.]

THE facts in this case are as follows: The deceased was engaged as a laborer in connection with loading at various quarries wagons which were afterwards hauled by a traction engine over the roads of Banffshire to Portsoy. The deceased's main duties were to help at the loading and unloading and to accompany the wagons on their journeys. On the occasion of his death he was sitting on one of the wagons which was being hauled by the engine in the prosecution of one of the intermediate journeys from one quarry to another. While sitting on the wagon he dropped his pipe and got down to recover it; in so doing he stumbled and fell, and was run over by the wagon. The arbitrator found as a fact that "the deceased Peter M'Lauchlan attempted to get down from the wagon, not for any object connected with his employment with the respondent, but for his own purpose," and proceeding upon that found in law that the dependent was not entitled to compensation in respect that the accident was not an accident arising out of his employment in the sense of the Workman's Compensation Act, 1906, s. 1 (1).

The LORD PRESIDENT (after stating the facts as above). The question before your Lordships is whether the finding in law of the arbitrator can be supported, in view of the various facts the arbitrator found to be proved, which I have detailed. I am of opinion that the finding cannot be supported. I think the fallacy that has led the learned arbitrator astray is connected with the true meaning of the words "his own purpose." In one sense anything a man does in connection with his own body is done for his own purpose — eating and drinking are illustrations, but these are none the less things a workman is perfectly entitled to do in the course of his employment. The Lord Chancellor (Lord Loreburn) in the course of his opinion in the case of Moore *v.* Manchester Liners, Limited, [1910] A. C. 498, at p. 500, said this: "I think an accident befalls a 'man in the course' of his employment if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time to do that thing." Now this man's operation of getting down from the wagon to recover his pipe seems to me to satisfy all those conditions. Taking them in their inverse order, he had a right to be at the place, riding on or walking beside the wagons; he was within the time during which he was employed, because the accident happened during the actual period of transit; and he was doing a thing which a man while working may reasonably

do — a workman of his sort may reasonably smoke, he may reasonably drop his pipe, and he may reasonably pick it up again.

I think this case is in thorough contrast to the cases which were cited to your Lordships of the engine-driver and the ticket-collector. Each of those men was doing something which was not incidental to his ordinary work, but took him away from his work for a purpose purely his own — the engine-driver went to fetch a book, and the ticket-collector to talk to a lady passenger.

A good deal has been said about the difference between an accident arising "out of" and one arising "in the course of" the employment No doubt in the earlier cases under the Act there was a certain amount of difficulty in the distinction, but my view on the matter is quite determined. I think it is impossible to have an accident arising out of, which is not also in the course of the employment, but the converse of this is quite possible, as, for instance, if a workman were shot by a lunatic, or struck by lightning, while at the moment engaged in his work. In a great many cases, however, the two phrases do not admit of separate consideration, and the present is one of those cases. If this accident took place in the course of the workman's employment, it also indubitably arose out of that employment; if not, not. On the whole matter I propose that we should recall the finding of the arbitrator and find the widow entitled to compensation. The other Lords concurred.

Appeal allowed.

3821H2

PLUMB *v.* COBDEN FLOUR MILLS CO., LTD.

HOUSE OF LORDS, 1913.

[*Reported* [1914] *A. C.* 62.]

VISCOUNT HALDANE, L. C. My Lords, in this case I have had the advantage of reading the judgment prepared by my noble and learned friend LORD DUNEDIN, and I entirely concur in it.

LORD KINNEAR desires me to express his concurrence also in the judgment of my noble and learned friend.

LORD DUNEDIN. My Lords, I have not the slightest doubt as to the soundness of the judgment appealed from. As, however, we had the benefit of a very able argument and a copious citation of authorities, it may be of use to formulate the conclusions at which I have arrived.

The facts of the case are simple. The appellant was a foreman worker in the employment of the respondents, and his duties on the day on which he was injured consisted in stacking bundles of sacks in a room in the respondents' premises. The work was done by hand. In the room in which this was being done there ran along the ceiling a shaft

which transmitted power to machines in other rooms, but there were no pulleys on the shaft in this room, and it was not used in connection with any machine in this room. The stack had arrived at the height of about seven feet and the bundles could no longer be thrown up from the bottom. The appellant, who was on the top of the stack, then improvised a method of getting up the sacks. He put a rope round the revolving shafting, attached one end to the bundle, and sufficient tension being put on the other end of the rope to ensure friction, the sack was drawn up as by a crane. A bundle of sacks was drawn too far and stuck between the shafting and the ceiling. The appellant, to free the bundle, cut the rope. The bundle fell, and falling on the bundle on which the appellant was standing caused him to lose his balance. In his effort to recover equilibrium one arm got entangled with the rope which was round the shafting, he was pulled over the shafting, and severely injured.

The question for decision is, Did the accident arise out of his employment?

The Court of Appeal held that it did not, and I agree with them.

It is well, I think, in considering the cases, which are numerous, to keep steadily in mind that the question to be answered is always the question arising upon the very words of the statute. It is often useful in striving to test the fact of a particular case to express the test in various phrases. But such phrases are merely aids to solving the original question, and must not be allowed to dislodge the original words. Most of the erroneous arguments which are put before the courts in this branch of the law will be found to depend on disregarding this salutary rule. A test embodied in a certain phrase is put forward, and only put forward, by a judge in considering the facts of the case before him. That phrase is seized on and treated as if it afforded a conclusive test for all circumstances, with the result that a certain conclusion is plausibly represented as resting upon authority, which would have little chance of being accepted if tried by the words of the statute itself.

Under this reservation, I propose shortly to examine some of the tests which have been found useful in the various cases which have occurred where the point was whether or not the accident arose out of the employment.

The first and most useful is contained in the expression "scope" or "sphere of employment." The expression was used in an early case, the case of Whitehead v. Reader, [1901] 2 K. B. 48, by Collins, L. J., who pointed out that the question of whether a servant had violated an order was not conclusive of whether an accident so caused did or did not arise out of the employment and put as the test, Did the order which was disobeyed limit the sphere of the employment, or was it merely a direction not to do certain things, or to do them in a certain way within the sphere of the employment?

In the case of Conway *v.* Pumpherston Oil Co., 1911 S. C. 660, in the Court of Session, I adopted the phrase of Collins, L. J., and pointed out that there were two sorts of ways of frequent occurrence in which a workman might go outside the sphere of his employment — the first, when he did work which he was not engaged to perform, and the second, when he went into a territory with which he had nothing to do. This case was approved and followed by the Court of Appeal in Harding *v.* Brynddu Colliery Co., [1911] 2 K. B. 747. The expression has been used in many other cases which it would be tedious and unnecessary to cite.

I am of opinion that this test is both sound and convenient, but it is not exhaustive, and it is not the most convenient for every statement of facts. Taken as it is, there may, and often will, be circumstances in which the application may be difficult and opinions may differ.

I pause here to notice an ingenious argument proposed by Mr. Davenport, founded on the cases I have cited. Founding on the cases of Conway, [1901] 2 K. B. 48, and Harding, [1911] 2 K. B. 747, he said: If this man had been told not to touch this shaft he would have received compensation, for he was doing his master's work, and it would have been merely disobedience. Why should he be worse off because he was told nothing about the shaft? The fallacy of this consists in not adverting to the fact that there are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere.

In the case of Barnes *v.* Nunnery Colliery Co., (1910) 4 B. W. C. C. 43; [1912]; A. C. 44, Lord Moulton put it thus: "The boy was only guilty of disobedience. Was this out of the scope of his employment, or only a piece of misconduct in his employment?" Though Lord Moulton arrived at a different result on the facts from that of the majority of the Court of Appeal, and that of this House, yet no fault is to be found with the question as put, and in this House Lord Loreburn, L. C., said the same thing in other words: "Nor can you deny him compensation on the ground only that he was injured through breaking rules. But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment." The Lord Chancellor there put the test cumulatively, because that fitted the facts of the case in which boys in a mine rode in tubs, a thing they were not employed to do, and which they had been expressly told not to do. But I imagine the propo-

sition is equally true if he had expressed it disjunctively and used the word "or" instead of "also."

In the cases in which there is no prohibition to deal with, the sphere must be determined upon a general view of the nature of the employment and its duties. If the workman was doing those duties he was within, if not he was without, or, to use my own words in the case of Kerr *v.* William Baird & Co., 1911 S. C. 701, an accident does not arise "out of the employment" if at the time the workman is arrogating to himself duties which he was neither engaged nor entitled to perform.

As I have already said, however, the question of within or without the sphere is not the only convenient test. There are others which are more directly useful to certain classes of circumstances.

One of these has been frequently phrased interrogatively. Was the risk one reasonably incidental to the employment? And the question may be further amplified according as we consider what the workman must prove to show that a risk was an employment risk, or what the employer must prove to show it was not an employment risk.

As regards the first branch, I think the point is very accurately expressed by the Master of the Rolls in the case of Craske *v.* Wigan, [1909] 2 K. B. 635, where he says: "It is not enough for the applicant to say 'The accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place.' He must go further and must say, 'The accident arose because of something I was doing in the course of my employment or because I was exposed by the nature of my employment to some peculiar danger.'"

As regards the second branch, a risk is not incidental to the employment when either it is not due to the nature of the employment or when it is an added peril due to the conduct of the servant himself. Illustrations of the first proposition will be found in all the cases where the risk has been found to be a risk common to all mankind, and not accentuated by the incidents of the employment. In application to facts the dividing line is sometimes very nearly approached, but I think that in all the cases the principle to be applied has been rightly stated. The cases themselves are too numerous to cite, but I may mention as illustrations the two lightning cases of Kelly *v.* Kerry County Council, (1908) 42 I. L. T. R. 23, and Andrew *v.* Failsworth Industrial Society, [1904] 2 K. B. 32, where on the facts the stroke of lightning was held, in the Irish case, to be a common risk of all mankind; in the English case, a risk to which, by the conditions of employment, the workman was specially exposed. Both these cases, in my humble judgment, were rightly decided.

An illustration of the second proposition will be found in the case already cited of Barnes *v.* Nunnery Colliery Co., [1912] A. C. 44, at p. 50, where Lord Atkinson said: "The unfortunate deceased in this

case lost his life through the new and added peril to which by his own conduct he exposed himself, not through any peril which his contract of service, directly or indirectly, involved or at all obliged him to encounter." Lord Atkinson added the words, "It was not, therefore, reasonably incidental to his employment. That is the crucial test." In the case of Watkins *v.* Guest, Keen & Nettlefolds, 5 B. W. C. C. 307, Lord Moulton criticized this sentence as cutting out the subsection as to serious and wilful misconduct. With great deference to my noble and learned friend, I think he was forgetting that Lord Atkinson was only applying a test, and not substituting it for the words of the Act. I cannot see that the serious and wilful misconduct section really introduces any difficulty. Reverting to the words of the Act, you have first to show that the accident arises out of the employment. Then in the older Act came the rider that even when that was so the workman still could not recover if the accident was due to the serious and wilful misconduct of the workman himself — a rider limited in the later Act to cases where the injury did not result in death or serious and permanent disablement. But the very fact that it is a rider postulates that the accident is of the class which arises out of the employment. A man may commit such a piece of serious and wilful misconduct as will make what he has done not within the sphere of his employment. But if death ensues and his dependents fail to get compensation it will not be because he was guilty of serious and wilful misconduct, but because the thing done, irrespective of misconduct, was a thing outside the scope of his employment. I have forborne to comment on the particular application to the facts of each case of the principles laid down in them. But, in view of what has been said, I think I must add that in my view the judgment of Buckley, L. J., who dissented in Watkins' case, 5 B. W. C. C. 307, was more in accordance with what had been laid down in this House in the case of Barnes *v.* Nunnery Colliery Co., [1912] A. C. 44, than the judgment of the majority.

Tried by either of the two tests I have examined, the appellant in this case seems to me equally to fail. But he does fail, not because he was acting outside the sphere of his employment, nor because by his conduct he brought on himself a new and added peril, but because he has failed to show any circumstances which could justify a finding that the accident to him arose "out of his employment."

LORD ATKINSON. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed.

3 8724

TRIM JOINT DISTRICT SCHOOL BOARD MANAGEMENT v. KELLY.

HOUSE OF LORDS, 1914.

[*Reported* 30 *Times L. R.* 453.]

APPEAL, from the decision of the Court of Appeal in Ireland.

The respondent claimed compensation as sole dependent for the death of her son. The son was employed by the appellants as an assistant master in the Trim District School, which was established as a school for training children of the Meath and other union workhouses in industrial pursuits. It was his duty to superintend the boys in school and in the playground. On February 12, 1912, the boys, who were angry with the master because he had prevented them from playing hockey in the school yard and because he had caught one of them stealing, planned an attack on him. They collected in a shed attached to the school, armed with hockey sticks, sweeping brushes, and scrubs — the last weapon consisting of a heavy block of wood attached to a brush-handle. The master came down from the school and walked along the shed. As he turned to come back one of the boys struck him on the head with a scrub and another struck him with a sweeping brush, inflicting such severe injuries that he died on the same day.

The County Court Judge held that the assault was an accident arising out of and in the course of the employment of the master, and that the accident caused his death. He therefore made an award in favor of the respondent. The Court of Appeal (the Lord Chancellor of Ireland, Lord Justice *Holmes*, and Lord Justice *Cherry*) affirmed the decision of the County Court Judge.

LORD HALDANE, L. C., said that the appeal raised a question of considerable importance as to the interpretation of the expression "Accident arising out of and in the course of the employment" in the Workmen's Compensation act, 1906. The circumstances in which the question had arisen were shortly as follows. The respondent was the mother of one John Kelly, who was an assistant teacher in the industrial school at Trim, and whose death was caused by injury received by him while superintending the scholars under his charge. It was not in dispute that the respondent was partly dependent on her son, or that if she was entitled to compensation for his death the amount awarded, £100, was a proper amount. The proceedings out of which the appeal arose were taken under the Act referred to, and assumed the form of an application for arbitration, which was heard by the County Court Judge of the county of Meath.

The deceased John Kelly, who was employed by the appellants, was

on February 12, 1912, superintending the boys in the school at exercise in the school yard when he was assaulted by several of them, and was struck with heavy wooden mallets. He died as the result of his injuries. The assault was premeditated and the outcome of a conspiracy among some of the boys to injure Kelly, who had punished or threatened to punish them, and who on the occasion in question was remonstrating with them.

After referring to the findings of the County Court Judge, the Lord Chancellor said that he wished before alluding to the authorities on the point to look at the question as if it were a new one. It seemed to him important to bear in mind that "accident" was a word the meaning of which might vary according as the context varied. In criminal jurisprudence crime and accident were sharply divided by the presence or absence of *mens rea*. But in contract such as those of marine insurance and of carriage by sea, that was not so. In such cases the maxim *In jure non remota causa sed proxima spectatur* was applied. He need only refer to what was laid down by Lord Herschell and Lord Bramwell, when overruling the notion that a peril or an accident in such cases was what must happen without the fault of anybody, in Wilson *v.* The Owners of the Xantho (3 The Times L. R. 766; 12 App. Cas. 503).

It was therefore necessary, in endeavoring to arrive at what was meant by "accident," to consider the context in which the word was introduced. The scope and purpose of that context might make the whole difference.

After alluding to the Workmen's Compensation Act, 1906, and observing that its principle was to impose on the employer a general liability to pay compensation in case of personal injury by accident arising out of and in the course of the employment when caused to a workman, he said that, if he had to consider the principle of the statute as *res integra*, he would be of opinion that the principle was one more akin to insurance at the expense of the employer of the workman against accidents arising out of and in the course of his employment, than to the imposition on the employer of liability for anything for which he might reasonably be made answerable on the ground that he ought to have foreseen and prevented it. He thought that the fundamental conception was that of insurance in the true sense. And if so it appeared to him to follow that in giving a meaning to "accident" in its context in such a scheme one would look naturally to the *proxima causa*, of which Lord Herschell and Lord Bramwell spoke in connection with marine insurance, the kind of event which was unlooked for and sudden, and caused personal injury, and was limited only by this, that it must arise out of and in the course of the employment. Behind this event it appeared to him that the purpose of the statute rendered it irrelevant to search for explanations or remoter causes, provided the circumstances brought it within the definition.

No doubt the analogy of the insurance cases must not, as Lord Lindley pointed out in his judgment in Fenton *v.* Thorley, [1903] A. C. 443, be applied so as to exclude from the cause of injury the accident that really caused it merely because an intermediate condition of the injury — in that case a rupture arising from an effort voluntarily made to move a defective machine — had intervened. If, so far as the workman was concerned, unexpected misfortune happened and injury was caused, he was to be indemnified. The important limitation which the statute seemed to him to impose in the interest of the employer, who could not escape from being a statutory insurer, was that the risk should have arisen out of and in the course of the employment.

It was, however, argued for the appellants that the definition of what accident meant in the Act was determined differently by the judgments in this House in the case of Fenton *v.* Thorley (*supra*), above referred to. But the House was not there considering an injury unexpected by the workman, but caused by the intentional act of another person. Nor did he think that the expressions used in the judgments excluded such a case from the definition actually given of accident. After saying that the element of haphazard was not necessarily involved in the word "accidental," Lord Macnaghten defined "accident" as used in the Act "in the popular and ordinary sense of the word as denoting an unlooked for mishap or an untoward event which is not expected or designed." He thought that the context showed that in using the word "designed" he was referring to designed by the sufferer. Nor did the judgment of Lord Lindley, when closely considered, appear to him to support the argument for the appellants.

His Lordship then considered in detail the judgment of Lord Lindley and referred to subsection 2(*b*) of section 1 of the Act, which he said confirmed the view that "accident" was used in that section as including a mishap unexpected by the workman, irrespective of whether or not it was brought about by the wilful act of someone else. In his opinion, the language of the judgments in Fenton *v.* Thorley, so far from being authority which supported the argument addressed to their Lordships from the Bar for the appellants, really assisted the contention of the respondent. For that language laid stress on the wide-reaching scope of the statute in question. It showed how that scope extended the liability it embraced beyond liability for negligence, and covered a field akin to statutory insurance against injury to the workman arising out of and in the course of his employment, provided that that injury was something not expected or designed by the workman himself. He thought that this conclusion as to what the Legislature intended by its language was strengthened by section 8, which placed disablement from certain industrial diseases on the same footing as the happening of an accident. This provision seemed to show that what

the legislature had in view as a general object to be attained was the compensation of the workman who suffered misfortune.

If the object of this statute were as wide as he gathered from the study of its language, its construction must, as it appeared to him, be that "accident" included any injury which was not expected or designed by the workman himself. If so the Court of Appeal in England was right in its decision in Nisbet *v.* Rayne (*supra*) that the definition extended to a case of death by murder, and the Court of Appeal in Ireland was right in Anderson *v.* Balfour, (1910) 2 Ir. 497, and in the present case in taking a similar view of the meaning of "accident." To take a different view appeared to him to amount, in the language of Mathew, L. J., in Challis *v.* L. and S. W. R. Company (21 The Times L. R., 486; [1905] 2 K. B. 154) to the reading into the Act of a proviso that an accident was not to be deemed within it if it arose from the mischievous act of a person not in the service of the employer. The Second Division of the Court of Session refused to follow these decisions in Murray *v.* Denholm, [1911] S. C. 1807. But he thought, for reasons that he had already given, that the Lord Justice Clerk misinterpreted Lord Macnaghten's judgment in Fenton *v.* Thorley (*supra*) when he read it as meaning that the expression "accident" could not be applied to accident arising out of wilful crime. And he was confirmed in his view of the unrestricted rendering of the meaning of the word which he attributed to Lord Macnaghten by reading his subsequent judgment in Clover, Clayton & Co. *v.* Hughes, [1910] A. C. 242, where he spoke of the "far-reaching application of the word," and intimated that what was held in Fenton *v.* Thorley (*supra*) was that "injury" and "accident" were not to be separated, and that "injury by accident" meant nothing more than accidental injury or accident as the word was popularly used.

In the present case the facts left little doubt on his mind that from one point of view at all events Kelly met with what might properly be described as an accident, and it was not the less an accident in an ordinary and popular sense in which the word was often used merely for the reason that it was caused by deliberate violence. For the rest, he had no doubt that there was evidence on which the arbitrator could find, as he did, that the accident so defined arose out of, and in the course of, the employment.

He was therefore of opinion that the appeal should be dismissed with costs.

LORD LOREBURN concurred. He said that etymologically the word accident meant something which happened — a rendering which was not very helpful. They were to construe it in the popular sense, as plain people would understand it, but they were also to construe it in its setting, in the context, and in the light of the purpose which appeared from the Act itself. Now, there was no single rigid meaning in the common use of the word. Mankind had taken the liberty of

using it, as they used so many other words, not in any exact sense, but in a somewhat confused way, or rather in a variety of ways.

People said that someone met a friend in the street quite by accident, as opposed to appointment, or omitted to mention something by accident, as opposed to intention, or that he was disabled by an accident, as opposed to disease, or made a discovery by accident, as opposed to search or reasoned experiment. When people used this word they were usually thinking of some definite event which was unexpected, but it was not so always, for one might say of a person that he was foolish as a rule and wise only by accident. Again, the same thing, when occurring to a man in one kind of employment, would not be called accident, but would be so described if it occurred to another not similarly employed. A soldier shot in battle was not killed by accident in common parlance. An inhabitant trying to escape from the field might be shot by accident. It made all the difference that the occupation of the two was different. In short, the common meaning of this word was ruled neither by logic nor by etymology, but by custom, and no formula would precisely express its usage for all cases.

Mr. Sankey ably urged upon their Lordships that this man could not have been killed by accident because he was struck by design. Suppose some ruffian laid a log on the rails and wrecked a train, was the guard who had been injured excluded from the Act? Was a gamekeeper who was shot by poachers excluded from the Act? There was design enough in either case, and of the worst kind. In either case he would have thought, if the nature of the man's employment was looked at, it might be said he was injured by what was accident in that employment. When Lord Macnaghten, in Fenton *v.* Thorley (*supra*) spoke of the occurrence being "undesigned," he thought he meant undesigned by the injured person. One could not imagine its being said of a suicide that he was killed by accident. He found that to treat the word accident as though the Act meant to contrast it with design would exclude from what he was sure was an intended benefit numbers of cases which were to his mind obviously within the mischief. That made him realize the value of the old rule about construing a remedial statute. Just as in the case of the guard or the gamekeeper, so here this man was injured by what was accident in the employment in which he was engaged. It was not the less so that the person who inflicted the injury acted deliberately. He also came to the conclusion that there was evidence to support the finding of the County Court Judge that the accident arose out of the employment.

LORD DUNEDIN differed. After discussing Lord Macnaghten's definition of "accident," in Fenton *v.* Thorley (*supra*), he said that there was one matter of completely general application which he conceived was authoritatively decided by Fenton's case (*supra*) and that was that the expression "injury by accident" in the statute must be in-

terpreted according to the meaning of the words in ordinary popular language.

Now, there was no authoritative test of what was the meaning of popular language. On such a matter they were bound to take their own personal experience as persons well acquainted with popular language. For himself, he confessed that it seemed so clear that in popular language the injury in this case was not an injury caused by accident, that it was difficult for him to use terms which might not appear wanting in respect to those who had expressed themselves otherwise.

It must be conceded that the injury here was caused by design — *i. e.*, that there was an intention to inflict an injury. To his thinking, the word accident in popular language was the very antithesis of design. He brushed aside at once all argument as to acts of conscious volition. The design must be design to inflict the injury, not design to do the act which might, as it turned out, be the cause of the injury. Popular language bore him out in this distinction. If a workman kicked a brick off a scaffold and it happened to hit and injure a man below, popular language would say he had met with an accident. Popular language in this case, he maintained, would never say that Kelly met his death by accident. It would say that he was murdered. In so doing it might not be positively accurate. The crime as a crime might possibly not be murder, but only manslaughter, as indeed, a jury found. But whether murder or manslaughter mattered not. Both terms were negative of accident in the popular sense. And here he would like to say that in his view criminal law had nothing to do with the matter. Criminal law had to do with the *mens rea*. When one said that popular language would describe this as murder, that was because the narrator of what had happened would naturally use a positive expression which according to his view fitted the facts. The point was that he would not use the expression "accident," because he would consider it inappropriate. Suppose A attacked B, and was shot by B in self-defense, there would be no *mens rea* in B, and no crime. None the less, no one popularly would describe A's death as a death by accident.

He wished to add a word as to the scope of the statute. It was said to aid the argument in favor of the enlarged meaning of accident to consider that the statute introduced a system of compulsory insurance of the workman by his employer. Again, with great deference, he could not see that by this statute the argument was forwarded one whit — insurance let it be — but insurance against what? In a contract one found an answer to this question in the terms of the policy. Here the policy was the Act of Parliament and by an interpretation of its terms one must stand or fall. So that it only came back to the same question. What was the meaning of the word as used? As for further speculations, these, he humbly thought, were entirely outside their province. He would only say that if judges were to indulge in

speculations and reminiscences, they would probably find that such speculations and reminiscences did not altogether tally. But clearly they had nothing to do with such matters. Parliament might have left out the word accident. It did not do so. On the contrary, it put it in, as Lord Macnaghten said, with the approbation of all the other lords, in Fenton's case (*supra*), "parenthetically, as it were, to qualify the word injury, confining it to a certain class of injuries and excluding other classes," and they had to interpret it. And in interpreting it he would like to say that he agreed with his noble and learned friend, Lord Atkinson whose judgment he had the advantage of reading, that the interpretation of accident given by the appellants really cut the word accident out of the Act.

On the whole matter he put to himself the entire question in the words of the statute, Was what Kelly suffered an injury by accident arising out of and in the course of his employment? And remembering the repeated decisions of this House that he was to take the language in the ordinary popular meaning he answered unhesitatingly, No.

LORD ATKINSON and LORD PARKER of Waddington agreed with LORD DUNEDIN.

LORD SHAW of Dunfermline and LORD READING agreed with the LORD CHANCELLOR and LORD LOREBURN.

In the result the appeal was dismissed.

SMITH *v.* FIFE COAL CO., LTD.

HOUSE OF LORDS, 1914.

[*Reported* 30 *Times L. R.* 502.]

ON June 28, 1912, the appellant, in discharge of his duty as a miner in the Benarty pit of the respondents, prepared a hole at his working place there for blasting, by placing the charge and detonator therein, and then packing the charge. Following the practice in the mine, although the practice was unknown to the management, the appellant, acting upon the instructions of Howard, the shot-firer appointed in terms of the Explosives in Coal Mines Order of February 21, 1910, section 2 (*a*), connected the detonator wire to the cable. Under that Order the duty was placed upon the shot-firer of connecting the cable to the firing apparatus or battery, and thereafter of turning the handle on the battery so as to discharge the shot; but before performing either of these operations it was his duty under the Order to see that all persons in the vicinity had taken proper shelter. On the date in question the appellant, after connecting the cable to the charge, was proceeding to a place of safety in reliance upon the shot-firer's ascertaining that the appellant had taken shelter before he fired the shot.

The Sheriff-Substitute found that the appellant received personal injury by accident arising out of and in the course of his employment, and awarded him compensation. The Second Division held that there was no evidence to support the finding of the arbitrator and recalled his award.

LORD DUNEDIN. My Lords, I do not think it necessary to make any remarks of a general character upon the phrase in the statute "arising out of the employment," because I did so with the approval of other members of your Lordships' House in the very recent case of Plumb *v.* Cobden Flour Mills Company (30 The Times L. R., 174, [1914] A. C. 62), and I do not wish to repeat what I then said. Nor do I think that there was any divergence of opinion in the judgments of the learned judges in this case from the law as then laid down. Taking the phrase as a test, and not as a definition, it may, I think, be conceded that if the accident was due to the man's arrogating to himself duties which he was not called on to perform, and which he had no right to perform, then he was acting out of the sphere of his employment, and the injury by accident did not arise out of his employment. The sole question is, Was this so in this case? Or, in other words, What is the true view of the facts?

I regret that I cannot come to the same conclusion as that come to by the learned judges. I think that I can best make my view clear by taking the case of Kerr *v.* Baird (1911 S. C. 701) and contrasting it with this. In that case the miner arranged a shot and fired it entirely by himself — I mean without the presence or help of the shot-firer at any stage of the proceeding. It was held rightly that the accident was due to the action of the man, and that such action consisted in taking upon himself duties which he had no right to perform. Here, on the contrary, the miner did not arrange and fire the shot. One part of the composite action was his duty to insert and stem the detonator, and that he did. The next step — the connecting of the detonator wire to the cable — he had no business to do, and in doing it he did something which was not in the sphere of his employment. But two more stages are necessary before we arrive at the explosion which causes the injury and forms the accident — namely, the connecting of the cable to the battery and the putting of the battery into efficient action by the turning of the handle, and both these stages are done by the shot-firer. In the circumstances I cannot bring myself to see that the efficient cause of the accident was connected with the arrogation of unauthorized duty by the miner. It is true that no explosion could have taken place unless the cable had been connected with the detonator. But that is only a remote cause *sine qua non*, and one in which the relation of the appellant to the act as distinguished from any other person is immaterial. It seems to me that the question of fact which has to be answered is this: Did the injury to the appellant arise out of the illicit and unauthorized action of the appellant? The

answer to that, it seems to me, so far as the action of the appellant consisted in coupling the wire, is "No." The injury arose from the premature explosion, and that premature explosion was caused by the action of the shot-firer. His Lordship was therefore of opinion that the view of the facts taken by the arbitrator was correct, and that his finding should be restored.

LORD KINNEAR, LORD ATKINSON, and LORD SHAW of Dunfermline concurred.

LORD PARMOOR gave judgment to the same effect.

MARTIN v. J. LOVIBOND & SONS, LTD.

COURT OF APPEAL, 1914.

[*Reported* [1914] 2 *K. B.* 227.]

COZENS-HARDY, M.R. In this case the learned county court judge, a judge of very great experience, has held that the dependents of a deceased drayman are entitled to compensation. In these cases it is necessary to consider the nature of the employment, the obligations of the man with reference to his employment, and all the circumstances, before one can arrive at a conclusion. The man was a drayman. His duties were from eight in the morning till eight in the evening. All that time he was going round for his employers, who were brewers, not merely to deliver beer at the public-houses tied to the brewers' firm, but also to deliver bottled beer and other things to private customers, to obtain orders for beer and everything of that kind. He was going his round; the learned judge finds as a fact that he was in the particular street where this accident happened; he was there with his dray in the course of going his round. He was not deviating in any way from his duty. It was about two o'clock in the afternoon. What is the position of a man who cannot go home for his meals, who is bound to be away from his home from eight in the morning till eight in the evening, and whose business keeps him during all that time more or less constantly in the streets? This man pulled up his dray on the proper side of the road, crossed to a public-house, not to linger there at all, but for the purpose of getting a glass of beer. He had a glass of beer there, he was only away two minutes, and in crossing back from the public-house to the dray he was knocked down by a motor car.

In the first place, it is said that this accident did not arise in the course of his employment. I entirely fail to understand that. I do not think there was any breach or break in the course of his employment. I shrink from saying that a man who was away from home, and necessarily away from home for twelve hours, is guilty of breaking the course of his employment because he gets off the dray for necessary

purposes. As I put it during the course of the argument, supposing he had stopped to give the horses some water, could it be said that that was not in the course of his employment? I feel great difficulty in seeing that under circumstances like these the driver of the dray is not equally entitled to procure reasonable liquid refreshment for himself, not deviating from the course of his route, not lingering in the public-house, but simply going in and getting a glass of beer as in this case, and returning at once to his dray. I therefore think that there was no breach of the course of his employment, and that the accident did happen in the course of his employment.

Then it is said, and in truth, that the accident must arise not merely "in the course of" but "out of the employment," and that this man was no more exposed to the risk of being knocked down by a motor car than any other member of the public. I cannot assent to that. His duties as a drayman involved his being from eight in the morning till eight at night more or less actually in the streets of London, spending his life in the streets of London. It seems to me to bear the strictest possible analogy to the bicycle case — Pierce *v.* Provident Clothing and Supply Co., [1911] 1 K. B. 997, — where we held that a man who is exceptionally exposed to street accidents is entitled to claim in respect of such an accident as arising out of his employment, although an ordinary member of the public not so exceptionally exposed would not be so entitled.

The learned judge held that what the man did was not only in the course of his employment, but was done perfectly reasonably — not unreasonably in any way. He has held that what he did was really done in order to enable him to better discharge his duties as a drayman for his employers. I hold that there is no ground for differing from his decision.

SIR SAMUEL EVANS, PRESIDENT. I agree. As Lord Loreburn said in one of the cases in the House of Lords, the more one sees of these cases under the Workmen's Compensation Act, the more one feels that all of them are in reality pure questions of fact, with regard to which the only function of the court is to interpose when there is no evidence in support of a particular finding.

The facts here are few and simple, and I will not repeat them. I will only emphasize that the evidence before the learned county court judge and the finding of the learned judge were that this man was at his work for twelve hours or more, and further that during those twelve hours he was away from his home and his place of business. He had no eating or resting place except on his dray. On the day in question he goes to the public-house, not as a loafer, or as a lounger, or a man addicted to drink, but for the purpose of refreshing himself with one glass of beer, and the whole period of his absence, including the time taken up in ordering the refreshment and its consumption, the learned judge says was only two minutes. It is said that the accident that oc-

curred to this man while going back to his dray did not arise out of or in the course of his employment. Personally, I am very glad that the learned judge has found that what he did was a reasonable incident of his employment. In my opinion he was justified in so finding. If he had found that there was an implied term in his contract of service that the man should be allowed to take refreshment in this way during the twelve hours, I think no court would have disturbed his finding. The learned judge was amply justified in coming to the conclusion that the accident to the deceased, in the circumstances, arose out of and in the course of his employment. The appeal therefore fails.

EVE, J. I concur. The employment in this case was of a character which I think may be properly defined as continuous and peripatetic. It was an employment in which the workman was exceptionally exposed to street accidents. The peripatetic character of the employment made the accident one "arising out of the employment," and its continuity made it one "arising in the course of the employment." I think the learned judge was quite right.

Appeal dismissed.

McNICOL'S CASE. 397 Ld 2

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1913.

[*Reported* 215 *Mass.* 497.]

RUGG, C. J. This is a proceeding under St. 1911, c. 751, as amended by St. 1912, c. 571, known as the workmen's compensation act, by dependent relatives for compensation for the death of Stuart McNicol.

1. The first question is whether the deceased received an "injury arising out of and in the course of his employment," within the meaning of those words in Part II, § 1, of the act. In order that compensation may be due the injury must both arise out of and also be received in the course of the employment. Neither alone is enough.

It is not easy nor necessary to the determination of the case at bar to give a comprehensive definition of these words which shall accurately include all cases embraced within the act and with precision exclude those outside its terms. It is sufficient to say that an injury is received "in the course of" the employment when it comes while the workman is doing the duty which he is employed to perform. It "arises out of" the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment,

then it arises "out of" the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

The exact words to be interpreted are found in the English workmen's compensation act, and doubtless came thence into our act. Therefore decisions of English courts before the adoption of our act are entitled to weight. Ryalls *v.* Mechanics' Mills, 150 Mass. 190. It there had been held that injuries received from lightning on a high and unusually exposed scaffold, Andrew *v.* Failsworth Industrial Society, [1904] 2 K. B. 32; from the bite of a cat habitually kept in the place of employment, Rowland *v.* Wright, [1909] 1 K. B. 963; from a stone thrown by a boy from the top of a bridge at a locomotive passing underneath, Challis *v.* London & Southwestern Railway, [1905] 2 K. B. 154; and from an attack upon a cashier traveling with a large sum of money, Nisbet *v.* Rayne & Burn, [1910] 2 K. B. 689, all arose in the course and out of the employment, while the contrary had been held as to injuries resulting from a piece of iron thrown in anger by a boy in the same service, Armitage *v.* Lancashire & Yorkshire Railway, [1902] 2 K. B. 178; from fright at the incursion of an insect into the room, Craske *v.* Wigan, [1909] 2 K. B. 635; and from a felonious assault of the employer, Blake *v.* Head, 106 L. T. Rep. 822.

The definition formulated above, when referred to the facts of these cases, reaches results in accord with their conclusions. Applying it to the facts of the present case, it seems plain that the injury of the deceased arose "out of and in the course of his employment." The findings of the Industrial Accident Board in substance are that Stuart McNicol, while in the performance of his duty at the Hoosac Tunnel Docks as a checker in the employ of a firm of importers, was injured and died as a result of "blows or kicks administered to him by . . . [Timothy] McCarthy," who was in "an intoxicated frenzy and passion." McCarthy was a fellow workman who "was in the habit of drinking to intoxication, and when intoxicated was quarrelsome and dangerous, and unsafe to be permitted to work with his fellow employees, all of which was known to the superintendent Matthews," who knowingly permitted him in such condition to continue at work during the day of the fatality, — which occurred in the afternoon. The injury came while the deceased was doing the work for which he was hired. It was due to the act of an obviously intoxicated fellow workman, whose quarrelsome disposition and inebriate condition were well known to the foreman of

the employer. A natural result of the employment of a peaceable workman in company with a choleric drunkard might have been found to be an attack by the latter upon his companion. The case at bar is quite distinguishable from a stabbing by a drunken stranger, a felonious attack by a sober fellow workman, or even rough sport or horseplay by companions who might have been expected to be at work. Although it may be that, upon the facts here disclosed, a liability on the part of the employer for negligence at common law or under the employers' liability act might have arisen, this decision does not rest upon that ground, but upon the causal connection between the injury of the deceased and the conditions under which the defendant required him to work. A fall from a quay by a sailor while returning from shore leave, Kitchenham *v.* Owners of S. S. Johannesburg, [1911] 1 K. B. 523; S. C. [1911] A. C. 417; a sting from a wasp, Amys *v.* Barton, [1912] 1 K. B. 40; and a frost bite, Warner *v.* Couchman, [1912] A. C. 35, all have been held to be injuries not "arising out of" the employment. But we find nothing in any of them in conflict with our present conclusion. Nor is there anything at variance with it in Mitchinson *v.* Day Brothers, [1913] 1 K. B. 603, where it was held that injuries resulting from an assault by a drunken stranger upon an employee engaged at his work on the highway did not arise out of the employment. That was a quite different situation from the one now before us.[1]

DONOVAN'S CASE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1914.

[*Reported* 217 *Mass.* 76.]

SHELDON, J. The contest here is between Donovan, an employee of one McGreevey, and an insurance company which had insured McGreevey under the provisions of St. 1911, c. 751, Part V, § 3, as amended by St. 1912, c. 571, § 17. The point in dispute is whether Donovan's injury arose out of and in the course of his employment, within the meaning of Part II, § 1, of the act of 1911 above cited. See McNicol's case, 215 Mass. 497. This must be decided upon the facts found by the Industrial Accident Board in its review of the report of the committee of arbitration. St. 1911, c. 751, Part III, §§ 5, 10, 16, as amended by St. 1912, c. 571, §§ 10, 13, 15.

Donovan was employed by McGreevey in cleaning out catch basins at a place about two miles from his home. It had been and was his custom, in common with other employees and with the knowledge and consent of his employer, to ride to and from the vicinity of the catch basins

[1] The remainder of the opinion is omitted. — ED.

in a wagon furnished by his employer, the wagon meeting the employees on the street and the employer being notified if any of the employees failed to report for work at the beginning of the day. The wagon was at the service of the employees at the end of the day, and they might ride in it back to the employer's barn if they wished. Donovan was injured while so riding in this wagon at the end of his day's work, and the board has found that his transportation on the wagon was "incidental to his employment," and "therefore" arose "out of and in the course of said employment." The language of this last finding is a little obscure; but we treat it, as both counsel and also the Superior Court have treated it, as being an inference that Donovan's injury arose out of and in the course of his employment, drawn from the other facts stated, including the fact that the transportation was "incidental to his employment." The question to be decided is therefore whether this inference could be drawn from those facts; for the facts themselves now cannot be inquired into. St. 1912, c. 571, § 14.

There have been several decisions in England as to when and how far an employee can be said to have been in the employ of his master, while traveling to and from his work in a vehicle or means of conveyance provided by the latter, and how far injuries received in such a conveyance can be said to have arisen out of and in the course of the employment. Many of these decisions have been cited and discussed by Professor Bohlen in 25 Harvard Law Review, 401, *et seq.* From his discussion and the cases referred to by him, and from the later decisions of the English courts, the rule has been established, as we consider in accordance with sound reason, that the employer's liability in such cases depends upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right are permitted, to use by virtue of that contract. See Davies *v.* Rhymney Iron Co., 16 T. L. R. 329; Holmes *v.* Great Northern Railway, [1900] 2 Q. B. 409; Whitbread *v.* Arnold, 99 L. T. 103; Cremins *v.* Guest, Keen & Nettlefolds, [1908] 1 K. B. 469; Gane *v.* Norton Hill Colliery Co., [1909] 2 K. B. 539; Hoskins *v.* J. Lancaster, 3. B. W. C. C. 476; Parker *v.* Pout, 105 L. T. 493; Walters *v.* Staveley Coal & Iron Co., 105 L. T. 119, and 4 B. W. C. C. 89 and 303; Greene *v.* Shaw, [1912] 2 Ir. 430, and 5 B. W. C. C. 530; Mole *v.* Wadworth, 6 B. W. C. C. 128; Edwards *v.* Wingham Agricultural Implements Co., [1913] 3 K. B. 596, and 6 B. W. C. C. 511; Walton *v.* Tredegar Iron & Coal Co. 6 B. W. C. C. 592.

The finding of the Industrial Accident Board that Donovan's transportation was "incidental to his employment" fairly means, in the connection in which it was used, that it was one of the incidents of his employment, that it was an accessory, collateral or subsidiary part of contract of employment, something added to the principal part of that

contract as a minor, but none the less a real feature or detail of the contract. Whatever has been uniformly done in the execution of such a contract by both of the parties to it well may be regarded as having been adopted by them as one of its terms. Especially is this so where none of the provisions of the contract has been shown by either party, but everything is left to be inferred from their conduct. That was the reasoning of this court in such cases as Gillshannon *v.* Stony Brook Railroad, 10 Cush. 228, 231. McGuirk *v.* Shattuck, 160 Mass. 45, 47; Boyle *v.* Columbian Fire Proofing Co., 182 Mass. 93, 98; Kilduff *v.* Boston Elevated Railway, 195 Mass. 307; and Feneff *v.* Boston & Maine Railroad, 196 Mass. 575, 577.

Accordingly we are of the opinion that the Industrial Accident Board had the right to draw the inference that Donovan's injury arose out of and in consequence of his employment.

Under our own decisions, Donovan at the time of his injury was in the employ of McGreevey and was a fellow servant with the driver of the wagon. O'Brien *v.* Boston & Albany Railroad, 138 Mass. 387. See also the cases last above cited. It is not easy to suppose that the Legislature intended that one who was under the disabilities of a servant should be excluded arbitrarily from the benefits which it undertook to give to all employees. The provisions of the act are to be construed broadly rather than narrowly. Coakley's Case, 216 Mass. 71, 73.

The decree of the Superior Court [1] must be affirmed; and it is

So ordered.

MILLIKEN'S CASE.

401 Lt2

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1914.

[*Reported* 216 *Mass.* 293.]

LORING, J. This is an appeal from a decree of the Superior Court [*Morton,* J.] based on a decision of the Industrial Accident Board ordering the insurer to pay $1,950 for the death of Frank T. Milliken. The facts found by the board were these:

Milliken, at the time of his death in October, 1912, and for some twenty-seven years before that time, had been a driver in the employ of A. Towle and Company, the insured, who were teamsters. Some four or five years before his death Milliken, in the course of his employment, fell from his wagon, striking on his head. This caused *inter alia* an impairment of memory. One afternoon in July, 1912 (three months before his death), Milliken lost his memory while driving his employers' wagon in Boston, and for half an hour was unable to renember where he was or to identify the streets in which he was driving, although they

[1] The decree was made by *Pierce,* J. The insurer appealed.

were streets with which he was "thoroughly familiar." During the day of October 8, 1912, from a similar failure of memory Milliken did not call for packages, as his duties required, and reported (contrary to the fact) that he had not received them because they were not ready. Thereupon he was directed to drive his wagon to his employers' stable in Charlestown to be put up for the night. Driving his wagon to the stable for the night was part of Milliken's regular work. This order was given to Milliken, at about five o'clock in the afternoon at his employers' Boston office in Matthews Street near Post Office Square. "At some place between Post Office Square and the stable in Charlestown he was seized with such a loss of memory and mental faculties that he was unable to recognize streets and places, and on account of such disordered mental condition he became lost and unable to direct the horse to the stable." About eleven o'clock that night Milliken was seen driving the wagon in a private way in Burlington and was helped back to the public highway, whereupon he drove away in the direction of Lowell. At this time Milliken would not speak. At about six o'clock the following morning Milliken was found lying in a swamp in Woburn and — with the exception of his head — covered with mud and water. His hat was found on the "adjacent road" some two hundred feet away, and the horse and wagon were found "by the side of said road about half a mile distant in the direction of Boston." Milliken was taken to a hospital at Woburn, where he died on October 14, without recovering his memory. He "spoke in a delirium only of looking for his horse." The cause of his death was pneumonia, brought on by cold and exposure while lying in the swamp.

The Industrial Accident Board found: "That the loss of memory with which the employee, Milliken, was seized was not in itself a fatal disorder, and that he would not have met his death as he did but for the horse and wagon and his effort to get them to the stable."

The dependent's contention is that Milliken's death was caused by pneumonia brought on by his falling into the swamp and lying there all night; that under these circumstances falling into the swamp and lying there all night was a personal injury which caused his death; and for this she relies on Alloa Coal Co. *v.* Drylie, 50 S. L. R. 350, and Kelly *v.* Auchenlea Coal Co., 48 S. L. R. 768.

The fact that Milliken "would not have met his death as he did but for the horse and wagon and his effort to get them to the stable," goes no farther than to show that the personal injury suffered by Milliken was a personal injury "in the course of his employment."

The difficulty in the case arises from the provision that the personal injury must be one "arising out of" as well as one "in the course of his employment."

It was held in McNicol's case, 215 Mass. 497, that the provision limiting the personal injuries for which compensation is to be made to those "arising out of" the employee's employment means that the na-

ture and conditions of the employment must be such that the personal injury which in fact happened was one likely to happen to an employee in that employment. In that case it was said that there must be a "causal connection" between the employment and the injury.

There is nothing in the employment of driving a wagon which makes it likely that the employee will alight from his wagon, wander to and fall into a swamp, and lie there all night. The distinction between the case at bar and a case within this clause of the act is well brought out by what is suggested by a remark of the majority of the Industrial Accident Board. If the horse driven by Milliken had run away and Milliken had been thereby thrown out and killed, the personal injury in fact suffered in that case would have been one which from the nature of his employment would be likely to arise, and so would be one "arising out of his [the employee's] employment." But as we have said, there is nothing in the employment of driving a wagon which makes it likely that the employee will alight from his wagon, wander to and fall into a swamp, and lie there all night. Sneddon *v.* Greenfield Coal & Brick Co., 47 S. L. R. 337, much relied on here by the dependent, is another case which brings out the distinction. There a miner got lost in the underground ways of a mine and was killed by the exhaust steam from an engine which was not fenced off. See also Wicks *v.* Dowell & Co., [1905] 2 K. B. 25.

We find nothing in the other cases relied on by the dependent which calls for notice.

It seems plain that, if Milliken's death was caused by a personal injury, it was the one which happened some four or five years before the occurrence here complained of and before the workmen's compensation act was passed. At that time he fell from his wagon and striking on his head suffered as a result "an impairment of his memory."

The decree of the Superior Court appealed from is reversed, and a decree should be entered declaring that the dependent has no claim against the insurer.

So ordered.

SUNDINE'S CASE.

403 742

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1914.

[*Reported* 218 *Mass.* 1.]

SHELDON, J. It is provided by statute (St. 1911, c. 751, Part III, § 17) that "if a subscriber enters into a contract, written or oral, with an independent contractor to do such subscriber's work . . . and the association would, if such work were executed by employees immediately employed by the subscriber, be liable to pay compensation under this act to those employees, the association shall pay to such employees

any compensation which would be payable to them under this act" if the independent contractor were a subscriber. By the word "association" is meant the Massachusetts Employees' Insurance Association, Part V, § 2, of the same act; and this insurance company is under the same liability that the association would have been. St. 1912, c. 571, § 17. It follows that the petitioner has the same rights against this insurance company as if it had directly insured her employer Olsen.

The insurer does not deny this, but it contends that the petitioner's injury did not arise "out of and in the course of" her employment within the meaning of Part II, § 1, of the act first referred to. This is because she was injured at about noon, after she had left the room in which she worked for the purpose of getting a lunch, and upon a flight of stairs which, though affording the only means of going to and from her workroom, was yet not under the control either of Olsen, her employer, or of F. L. Dunne and Company, for whose work Olsen was an independent contractor.

The first contention, that she was not in the employ of Olsen while she was going to lunch, cannot be sustained. Her employment was by the week. It would be too narrow a construction of the contract to say that it was suspended when she went out for this merely temporary purpose and was revived only upon her return to the workroom. It was an incident of her employment to go out for this purpose. Boyle *v.* Columbian Fire Proofing Co., 182 Mass. 93, 102. The decisions upon similar questions under the English act are to the same effect. Blovelt *v.* Sawyer, [1904] 1 K. B. 271, which went on the ground that the dinner hour, though not paid for, was yet included in the time of employment. Moore *v.* Manchester Liners, 3 B. W. C. C. 527, where the House of Lords reversed the decision of the Court of Appeal, reported in [1909] 1 K. B. 417, and held, following the dissenting opinion of Moulton, L. J., that a temporary absence by permission, though apparently of longer duration than would have been likely in the case before us, did not suspend the employment, and that an injury occurring during such a temporary absence, arose "out of and in the course of" the employment. Gane *v.* Norton Hill Colliery Co., 2 B. W. C. C. 42, and [1909] 2 K. B. 539. Keenan *v.* Flemington Coal Co., 40 Sc. L. R. 144. MacKenzie *v.* Coltness Iron Co., 41 Sc. L. R. 6.

Nor do we regard it as decisive against the petitioner that she was injured while upon stairs of which neither Olsen nor F. L. Dunne and Company had control, though they and their employees had the right to use them. These stairs were the only means available for going to and from the premises where she was employed, the means which she practically was invited by Olsen and by F. L. Dunne and Company to use. In this respect, the case resembles Moore *v.* Manchester Liners, *ubi supra;* and that case, decided under the English act before the passage of our statute, must be regarded as of great weight. McNicol's case, 215 Mass. 497, 499. It is true that before the passage of St. 1911,

c. 751, the petitioner could not have held her employer for this injury. Hawkes *v.* Broadwalk Shoe Co., 207 Mass. 117. But that now is not a circumstance of much importance; for one of the purposes of our recent legislatures was to increase the right of employees to be compensated for injuries growing out of their employment.

It was a necessary incident of the employee's employment to use these stairs. We are of opinion that according to the plain and natural meaning of the words an injury that occurred to her while she was so using them arose "out of and in the course of" her employment. The decree of the Superior Court must be affirmed.

So ordered.

CHAPTER V.

PERMITTED ACTS.

SECTION I.

Duty to Act.

REX v. COMPTON.

ASSIZES. 1347.

[*Reported Liber Assisarum*, 97, *pl.* 55.]

H. DE COMPTON was indicted, &c., that he feloniously killed H. Vescy at C. on a certain day in the fourteenth year of the present King, and also for that he received one R., who was outlawed for felony, knowing, &c., for which he was now arraigned.

H. said that said H. V. died in the ninth year of the present King; and that said H. V. and another were indicted in the ninth year of the present King, before Sir T. de Rokeby, Sheriff of York, of divers felonies, when the sheriff assigned the said J. [H.?] de C. by his commission (which he exhibited to the court) to arrest and take the said H. and the other thieves; and the said H. de C. with others came to the said place, and there found the said H. and the other thieves, and showed them their warrant, which they had to arrest them, and ordered them to surrender; and they would not surrender, but defended themselves, and killed and wounded divers persons, and in this fight H. was killed. And we do not think that our Lord the King ought to impeach us of his death.

THORP, C. J. All shall be found out by the jury. (And he told them all that he had said.) Wherefore we ask you whether H. V. died in the ninth year of the present king and not in the fourteenth, as the indictment is, and if there was no other H. V. whom he killed in the fourteenth year, and also if he might have taken him without killing him, so that he killed him of his own malice, &c., and if you find that, speak of his lands and goods.

The jury said that H. had gone (as he said), and that there was no other H. V. than that one, &c., and that he could not have taken him in another way.

THORP. They have acquitted you of this charge, and we acquit you. And I say well to you that when a man kills another by his warrant he may well avow the fact, and we will freely acquit him without wait-

ing for the King's pardon by his charter in this case. And in many other cases a man may kill another without impeachment, as if thieves come to rob a man, or to commit burglary in his house, he may safely kill them, if he cannot take them. And note, how it was with a gaoler who came to the gaol with a hatchet in his hand, and just then the prisoners had broken their irons, and were all ready to have killed him, and they wounded him sorely, but with the hatchet in his hand he killed two, and then escaped, &c. And it was adjudged in this case by all the council that he would not have done well otherwise, &c. Likewise he said that every person might take thieves in the act of larceny, and felons in the act of felony, and if they would not surrender peaceably, but stood on their defence, or fled, in such case he might kill them without blame, &c.

HERBERD'S CASE. 415 Z+2

KING'S BENCH, 1457.

[*Reported Y. B.* 35 *H.* 6, 57, *pl.* 3.]

A WOMAN brings an Appeal for the death of her husband, in the King's Bench, against William Herberd, Knt., Walter Devers, Knt., and several others. And one of the defendants comes and says that the wife should not have this appeal, for he says that at the Sessions of the peace held at Hertford on a certain day &c., before, &c., it was presented by twelve lawful men sworn to inquire for the King, &c., that one J. W. of Hertford had feloniously killed one J. Vowant &c., and that the husband of the plaintiff, for whose death she has brought this appeal, abetted and comforted him in committing the said felony, &c., by force of which a warrant issued to the sheriff to take the body of the said J. W. and of this woman's husband, by force of which the sheriff returned the warrant served, and set them at the bar; by force of which the said J. W. was arraigned for the said felony and pleaded not guilty, and was found guilty, and by force of this he was hanged. And then the woman's husband was arraigned and pleaded not guilty, and was found guilty, and was sentenced to be hanged: all which he is ready to aver, and prays that it be allowed. And as to the felony he pleads not guilty, &c.

Littleton. This is no plea; he ought to have pleaded *not guilty* generally for you cannot justify a felony.[1] . . .

Wangford. In cases where it appears by the law that one has power to kill another he may justify the killing. As, if a sheriff or marshal of this bench be commanded by authority of law to execute a man and he executes him: if an appeal be brought against him, he may justify,

[1] Part of the argument is omitted. — ED.

since it appears of record that he had power to kill him; but if a stranger kill him, he could not justify, since it appears of record that he had no power to kill him. So here he has not alleged that he had any power to kill him, but like the greatest stranger in the world, and therefore he cannot have advantage of the matter of record.

MARKAM, J. The record makes no mention who has power to kill him, for the entry is only *sus. per coll.* and makes no mention to whom it is delivered, as to the sheriff or to another to make execution; so it does not appear who has power to kill him.

BINGHAM, J. If a sheriff be charged to hang a man and he cuts off his head, I tell you it is no felony, because he had the power to kill him.

POLE, J. Yes sir, it is felony, for he had no power to kill him, except according to the judgment, and if he does it otherwise he does it as a stranger; and therefore it is felony.

TUCK *v.* BELILES.

COURT OF APPEALS OF KENTUCKY.

[*Reported* 153 *Ky.* 848.]

HOBSON, C. J. On December 22, 1911, three warrants were issued by the judge of the Butler quarterly court against R. E. Tuck, in which he was charged with a breach of the peace, wilfully shooting his pistol in the streets of Morgantown and assault and battery on his wife. The warrants were placed in the hands of C. V. Beliles, who is the sheriff of Butler County. Beliles placed them in the hands of two of his deputies who undertook to execute them. They telephoned Beliles that they needed help, and he and another deputy then went to assist them in making the arrest. When they reached the house where Tuck was, in making the arrest one of them shot Tuck through the left arm, inflicting a serious injury. He brought his suit against the sheriff on his bond to recover for his injury.

According to his testimony on the trial, he was at his home, and went upstairs and was sitting on a box examining some tickets which he had when he heard somebody walk in. He looked around and a man shot his pistol and hollered at him, "Throw up your hands." The two deputies came up the stairs and stood near him while the sheriff said to him, "They want you up at the judge's office." He said, "I guess not, I have fixed all of this with Mr. Bradley." One of the deputies said, "Bring him on," and he replied, "You just keep your mouth out of this." At this the other deputy threw up his pistol and shot him. Mr. Bradley was the county attorney. He testified that Tuck came to his house that morning and that he told Tuck to get on his mule and go up to see his brother and straighten up and he would

do the best he could for him after he straightened up; that Tuck said that he was not going anywhere, and that he was going to see Bill Tuck, and was going to kill Ed Waddle before sunset; that he would kill them as fast as they came along. He also told the county attorney that he would kill the officers, and that he was not going to be arrested. The county attorney told the sheriff what he had said when he gave him the warrants and told him to be careful. The two deputies who first went to the house testified that they saw him as they approached the house, and that he ran into the house, and that they then learned that he had arms, and telephoned the sheriff. They did nothing more until the sheriff came. The sheriff's statement as to what occurred when he got there is in substance that he found the door of the house fastened, and after calling to Tuck repeatedly and telling him that he had always been his friend and wished no trouble, he forced the door open; that he could not find Tuck on the first floor of the house and after looking through this, went upstairs; that he was not to be seen anywhere upstairs; that when he got up there he called out as he had below repeatedly and finally he struck a match, and looking over into a closet found Tuck hidden there; that when he found him Tuck said, "I want you to go away from here, I am not going to be arrested." He said "Elmwood, I have been a friend to you," and that Tuck replied with an oath, and started to make a rush on them saying he would kill every one of them; that after calling on him to stop, he drew his pistol, and fired, when he could not stop him in any other way. The testimony of the sheriff is corroborated not only by the three deputies who were present but by a number of persons in the neighborhood who testified to hearing Tuck cursing and threatening the officers that he would kill them. On this evidence the jury found for the defendants. The plaintiff appeals.

It is insisted for the plaintiff that the sheriff is liable because he did not read the warrants to Tuck; but Tuck's own testimony shows that he understood very well what he was arrested for, and he knew that he was resisting the sheriff and his deputies. He knew the sheriff very well and knew the deputies. He knew the offenses he was charged with, and knew the purpose for which they had come to arrest him. It is true the warrants were not read to him, but he did not give the officers any opportunity to read the warrants. He resisted arrest as soon as they found him and according to the testimony of the officers immediately began an attack upon them.

The court by his instruction in substance told the jury that they should find for the plaintiff, unless they believed from the evidence that the plaintiff resisted arrest with force, and in that event the officers had the right to use such force as appeared to them in the exercise of a reasonable discretion to be necessary to overcome the force offered by Tuck and protect themselves at his hands, and if they used no more force than was necessary or apparently necessary for this

purpose, they should find for the defendants. The instructions appear to us to state fairly the law of the case. While an officer has no right to kill a man in order to arrest him for a misdemeanor, it is his duty to meet force with force, and to use such force as is necessary to make the arrest. If in using such force, he is himself placed in peril, he may use such force as is necessary for his self-protection. (Read *v.* Com., 125 Ky. 126; Stevens *v.* Com., 124 Ky. 32.) The officer is armed with the authority of the law. It is the duty of all good citizens to respect and obey him. If an officer could not meet force with force, desperadoes could never be arrested. It is the duty of the officer to execute his process, and when he is resisted he must stand his ground and meet force with force. If the proof for the defendant is true, Tuck's conduct was entirely without excuse.

The evidence of Tuck's threats, made on that morning, and his repeated declarations that he would not be arrested, were competent to show his state of mind, and these threats having been communicated to the officers, proof of them was admissible in their behalf to show the grounds upon which they acted. On the whole case we find no substantial error in the proceedings. The verdict of the jury is sustained by the evidence.

Judgment affirmed.

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PEOPLE *v.* WARREN.

SUPREME COURT OF NEW YORK, 1843.

[*Reported* 5 *Hill*, 440.]

CERTIORARI to the Oneida general sessions, where the defendant was convicted of an assault and battery upon one Johnson, a constable. Johnson arrested the defendant on a warrant issued by the inspectors of election of the city of Utica for interrupting the proceedings at the election by disorderly conduct in the presence of the inspectors. (1 R. S. 137, § 37.) The warrant was regular and sufficient upon its face. The defendant resisted the officer, and for that assault he was indicted. The defendant offered to prove that he had not been in the presence or hearing of the inspectors at any time during the election, and that Johnson knew it. The court excluded the evidence, and the defendant was convicted. He now moved for a new trial on a bill of exceptions.

PER CURIAM. Although the inspectors had no jurisdiction of the subject matter, yet as the warrant was regular upon its face, it was a sufficient authority for Johnson to make the arrest, and the defendant had no right to resist the officer. The knowledge of the officer that the inspectors had no jurisdiction is not important. He must be governed

and is protected by the process, and cannot be affected by anything which he has heard or learned out of it. There are some dicta the other way; but we have held on several occasions that the officer is protected by process regular and legal upon its face, whatever he may have heard going to impeach it.

OYSTEAD *v.* SHED.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1816.

[*Reported* 13 *Mass.* 520.]

TRESPASS for breaking and entering the plaintiff's dwelling house, taking and carrying away his goods, etc.

The defendant Shed justified as a deputy sheriff; and the others, as his assistants, pleaded severally. The questions in the case arose on the replication to the third plea by them respectively pleaded, in which plea each of the said other defendants sets out at large a *capias* awarded against one Chase, delivered to Shed, an officer having authority to serve the same, and alleges that the said officer being about to arrest Chase, he fled into the house of the plaintiff, who, upon a demand by Shed for leave to enter and arrest him, refused admission into the house and shut the outer door thereof; whereupon Shed opened a window, entered the house, and arrested Chase; and that the defendant, being required by Shed, entered the house by the door, which was then opened, etc.

The replication, after protesting that the said *capias* was never awarded, etc., alleges that Chase was at the time, and had been for a long time before, a lodger and boarder in the house of the plaintiff, and was quietly taking his repose there as one of his family, when the officer forcibly entered, etc., and then traverses the flight of Chase, as set forth in the bar.

To this replication there is a special demurrer.

PARKER, C. J.[1] . . . The fact alleged in the replication is, that Chase was quietly reposing in the plaintiff's house, being a lodger and boarder there when the officer entered. Is this of itself an answer to the bar, which avers that the officer being about to arrest Chase, he fled into the house?

This depends upon the relation which Chase had to the family of the plaintiff, for it is very clear that if the plaintiff, or one of his family, had fled into the house to avoid an intended arrest, the officer would have been liable in trespass for entering the house forcibly in pursuit of him. It would not be so, if an arrest had been actually made, and the flight had taken place upon an escape.

[1] Part of the opinion, discussing a question of pleading, is omitted. — ED.

The authorities do not clearly show, what persons are considered as belonging to the family of a householder, and so having a right to protection under his castle.

The very learned judges Foster, Hale, and Coke, in treating of the inviolability of dwelling houses, say that the outer doors or windows shall not be forced by an officer, in the execution of civil process against the occupier or any of his family, who have their domicil or ordinary residence there: but that the house shall not be made a sanctury for other persons: so that, if a stranger, whose ordinary residence is elsewhere, upon a pursuit, take refuge in the house of another, the house is not his castle; and the officer may break open the doors or windows in order to execute his process: and if one, upon escape after an arrest, flee into his own house, it shall not protect him, etc. According to these principles, not only the children and the domestic servants of the occupier are of his family, and so entitled to protection; but also permanent boarders, or those who have made the house their home, may properly be considered as a part of the family.

The purpose of the law is, to preserve the repose and tranquillity of families within the dwelling house: and these would be as much disturbed by a forcible entry to arrest a boarder or a servant, who have acquired, by contract express or implied, a right to enter the house at all times, and to remain in it as long as they please, as if the object were to arrest the master of the house or his children. A stranger, or perhaps a visitor, would not enjoy the same protection: for as they have acquired no right to remain in the house, if the occupant should refuse admission to the officer, after his purpose and his authority were made known, the law would consider him as conspiring with the party pursued, to screen him from arrest, and would not allow him to make his house a place of refuge.

STATE v. MAYOR AND ALDERMEN OF KNOXVILLE.

SUPREME COURT OF TENNESSEE. 1883.

[*Reported* 12 *Lea*, 146.]

FREEMAN, J., delivered the opinion of the court.[1]

It appears from this record that in the latter part of the year 1882, and first of 1883, the small-pox, as an epidemic, prevailed to a considerable extent. The city of Knoxville, as well as the county, thought it their duty, through their authorized agencies, to take active measures to relieve as well as prevent the spread of the disease both in the city and the surrounding country. To this end a small-pox hospital was established at the fair-grounds, about two miles from the city, with suita-

[1] Part of the opinion is omitted.

ble buildings for receiving infected patients, and two physicians, Drs. Hudgins and Shaw, employed, the one by the city, the other by the county, to attend patients suffering with the disease. Among the precautionary measures taken to prevent the spread of the plague, the clothing, beds, and bedsteads used by persons who had the disease, and either recovered or died, were directed to be burnt, no doubt under the direction of the attending physicians. This, we take it, was done regularly and frequently for some months, as often as occasion required. The fair-ground's property consisted of between sixty and sixty-five acres of land, the building being within this property, and the infected articles burnt on these grounds, probably in pits dug for the purpose. The burning seems to have been some four hundred yards from the nearest houses, but there appear to have been numerous dwellings occupied about that distance, and farther off, but still liable, more or less to be affected by the smoke and the scent from the burning clothing, etc. That this at times was more or less offensive, is probable, if not certain. For a nuisance, the result of this burning and the unpleasant effects of the smoke thus generated and disseminated, the defendants are indicted.

The jury have found the defendants guilty, and on the facts, that is of the existence of the smoke, and of its rendering the occupation of the houses of persons living hard by uncomfortable, and the air less pure temporarily than otherwise would have been the case from the nature of their location, there is no ground on which this court could reverse the finding of facts for want of testimony to sustain it.

The question is, whether this finding was under a correct statement of the law by the court below, and whether there was a sufficient *justification* and *authority* for what was done; whether his Honor gave defendants the benefit of the rules of law tending to show such justification and authority for their acts, which are not of themselves denied or seriously controverted.

The proof very definitely tended to show that burning the articles mentioned was the best means known of preventing the spread of infection, if not the only certain means of doing so, that it was the uniform practice in hospitals where such diseases were being treated, and recognized as the accredited mode recommended and endorsed by the best lights of the medical profession.

If this be so, then the simple question is, whether parties using such means so accredited, in good faith, shall be held criminally liable if they should produce temporary inconvenience to other parties near by; for this is the substance of the request refused by his Honor.

The loss to the individuals was only a temporary one, by having the air for a time impregnated with smoke, offensive though it was; yet if this was done in order to, and did reasonably tend to, prevent the spread of a loathsome and dangerous disease, by which the lives of from twenty-five to fifty per cent of persons attacked are liable to die, as one physician swears in this case, then it is too clear to doubt that the

interest of the life of many cannot be permitted to be perilled that others may enjoy the air untainted by smoke from clothing infected by the disease being burned at a reasonably safe distance from their dwellings. If you may rightfully destroy the house in which a man dwells in order to prevent the spread of a fire or the ravages of a pestilence, it follows you may much more destroy for a time the salubrity of the air, provided it shall tend reasonably to the result demanded by the public interest.

We do not deem it necessary to enlarge on such a proposition.

The rule applicable to such a case is that, if the act was done by public authority or sanction, and in good faith, and was done for the public safety and to prevent the spread of the disease, and such means used as are usually resorted to and approved by medical science in such cases, and was done with reasonable care and regard for the safety of others, then the parties were justified in what they did, and the parties inconvenienced could not complain, nor could the state enforce a criminal liability for results of temporary inconvenience or unpleasantness that accrue from the use of such proper and accredited means for the safety of the community against the spread of disease.

The theory of his Honor is the opposite of this, and is erroneous. Let the judgment be reversed and the case remanded for a new trial.

PEOPLE *v.* FITZGERALD.

COURT OF APPEALS, NEW YORK, 1887.

[*Reported* 105 *N. Y.* 146.]

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 11, 1887, which affirmed a judgment of the Court of Oyer and Terminer of the county of Chemung, entered upon a verdict convicting the defendant of the crime of body stealing.

The facts, as stated in the dissenting opinion of *Hardin*, J., in the court below, are as follows: General Irvine died in the city of San Francisco on the night of November 12, 1882, suddenly, having during the day been out gunning, returning to his home in the evening, after partaking of a light repast, consisting of tea, eggs, cold meat, and bread and butter, prepared by his wife Phœbe, who with their daughter, Mrs. Merkle, were occupying apartments together. Soon after partaking of the refreshments he became distressed and made complaints of internal pains. The daughter left for a physician, and, upon returning, they found that death had taken place. The remains were taken that night to the rooms of an undertaker and they were subsequently embalmed, and on the fourth of December were conveyed

by the widow and daughter to the city of Elmira, where they were interred in Woodlawn Cemetery.

About a year after the death inquiry was instituted as to the cause thereof, and the defendant employed a detective named Nealson, who visited the city of Elmira, and returned to San Francisco and made a report to the defendant.[1]

The defendant and Nealson visited the office of Dr. Reilly, the coroner of the county of Chemung, and held a conversation in regard to the circumstances attending the death of the deceased. After that interview Coroner Reilly determined to proceed in the premises. He visited Nathan Baker, superintendent of Woodlawn Cemetery, at his house and said to him, "That he had evidence to satisfy him that a wrong had been perpetrated, or sufficient to warrant him in making an examination of the body of General Irvine. . . . That he had sufficient grounds of acting and he asked Baker, the superintendent, to act," showing him one of the affidavits and stating that he had others. Thereupon the superintendent determined to act in the premises and facilitate the proceedings in behalf of the coroner. Thereupon directions were given Abbott, the sexton, to open the grave and remove the remains to the vault in the cemetery for the purpose of an examination.

Reilly, the coroner, also applied to Dr. Wey to become one of two physicians to make the examination, and on the evening of the eighth of April Reilly visited the office of Wey, with Nealson, avowing that he had full authority in the premises "to conduct an examination and have an examination made by the physicians." The hour was fixed for an examination at ten the next morning and Reilly informed Wey that he would "notify Dr. Squires . . . and we might expect to meet at the receiving vault in Woodlawn Cemetery" at ten the next morning. Accordingly they met the next morning at the receiving vault in Woodlawn Cemetery, where the physicians found Coroner Reilly and Nealson and Baker and Abbott. The body was found lying in a coffin or casket on the floor of the receiving vault. The coroner made a minute of the nature of the covering of the coffin and its handles and the plate and the descriptions of every other matter connected therewith. Drs. Wey and Squires raised the head and shoulders of the body and after carefully scrutinizing the face and the coroner making a minute thereof, a careful examination was made of the head, and the stomach and duodenum, and certain other parts of the body were removed and delivered to Dr. Reilly, who placed them in a vessel he had prepared for that purpose.

After the examination the coroner went over to the house of Abbott, the sexton, in the cemetery grounds, where Baker suggested the propriety of having a coroner's jury and Wey replied: "It is too late for such a proceeding."

[1] The statement of facts has been abridged. — Ed.

No jury was, in fact, sworn to hold an inquest. The remains were recoffined and returned to the grave, except the parts removed therefrom as already stated.

RAPALLO, J. The facts of this extraordinary case are fully stated in the dissenting opinion of *Hardin*, J., at General Term. We should content ourselves with concurring in that opinion, were it not that it simply orders a new trial for errors in the charge, for refusals to charge, while we think that it should have gone farther and have held that the facts of the case did not establish a crime punishable under the statute against body stealing (Penal Code, § 311), under which the prisoner was indicted and convicted, and which is in the following words: "Sec. 311. A person who removes the dead body of a human being, or any part thereof, from a grave, vault, or other place where the same has been buried, or from a place where the same has been deposited while awaiting burial, without authority of law, with intent to steal the same, or for the purpose of dissection, or for the purpose of procuring a reward for the return of the same, or from malice or wantonness, is punishable by imprisonment for not more than five years, or by a fine not exceeding one thousand dollars, or both."

This statute describes every kind of "body stealing" known to the law. The addition inserted in the Penal Code, "or for the purpose of obtaining a reward for the same," was the only substantial change made since the Revised Statutes, in the definition of this heinous crime.

The intent of the statute is manifest. It certainly was not intended to apply to exhumations made by legally constituted public authorities for the purpose of ascertaining whether crime has been committed in producing the death of the person whose body is exhumed. When the exhumation is made, not secretly, but publicly, on open application to the officer of justice charged with the duty of inquiring into the cause of death of any person whose body is brought within his jurisdiction, it is a total misapplication of the statute against body stealing to use it for the purpose of imposing its punishment on all persons concerned in the exhumation, in case any proceedings of the officer, under whose direction it was made, should be found to be irregular.

The irregularity alleged in this case in the conduct of the coroner is that he did not impanel a jury before he ordered the *post mortem* examination to be made by the physicians whom he summoned for the purpose. A sufficient number of persons to form a jury was assembled by direction of the coroner, but the jury was not drawn and impaneled. I refer to the opinion of Judge Hardin as correctly stating the facts, which we have verified by an examination of the testimony.

The point of law is debatable whether a *post mortem* should take place before the coroner has impaneled a jury. But it is settled that the *post mortem* should not be in the presence of the jury, and that they are to be instructed by the testimony of the physicians who are designated by the coroner to make it. The dissection by order of the

coroner is expressly authorized. (Penal Code, § 308; Crisfield *v.* Perine, 15 Hun, 202; affirmed, 81 N. Y. 622.)

If, as in England at one time, the findings of the coroner's jury were to stand as an indictment by a grand jury, some point might be made on behalf of the accused, as to the validity of the inquest in such a case as this. But to resort to those questions for the purpose of supporting an indictment for body stealing, under the circumstances of this case, is quite unreasonable. In the present case the defendant communicated to the coroner, in the form of affidavits (whether legally authenticated or not is immaterial) information which should have induced any magistrate, not neglectful of his duty, to believe that he ought to investigate the matter presented to him. Those affidavits made a strong case to lead the coroner to believe that a murder had been committed, and that an examination of the body, which was within his jurisdiction, would disclose the fact. The defendant sought an examination of the body. She asked the coroner to do his duty, and to examine the body. Whatever motives may have influenced her, no one can suppose that, however unfounded her belief might have been, there was not sufficient in the papers she presented to the coroner, to justify his action, and there is no pretense that the affidavit of Dr. Wooster, which she produced, had been in any manner influenced by her. Her silence during several years after the death of General Irvine, is the main argument against the *bona fides* of her charge, and it is said that her desire was not so much the punishment of crime, as to obtain some pecuniary advantage for herself by making defamatory charges. However this may be, if she committed a wrong, it was not the crime of body stealing, and on this ground the conviction, and the judgment of the General Term affirming it, should be reversed and the prisoner discharged.

All concur.

Judgment reversed.

AXTELL'S CASE. 425-442

ALL THE JUDGES OF ENGLAND, 1660.

[*Reported J. Kel.* 13.]

MEMORANDUM, That upon the tryal of one Axtell, a soldier, who commanded the guards at the king's tryal, and at his murder; he justified that all he did was as a soldier, by the command of his superiour Officer, whom he must obey or die. It was resolved that was no excuse, for his Superiour was a Traitor, and all that joyned with him in that Act were Traytors, and did by that approve the Treason; and where the command is Traiterous, there the Obedience to that Command is also Traiterous.

UNITED STATES v. CLARK.

U. S. CIRCUIT COURT, E. DIST. MICHIGAN. 1887.

[*Reported* 31 *Federal Reporter*, 710.]

BROWN, J. In view of the fact that this was a homicide committed by one soldier, in the performance of his alleged duty, upon another soldier, within a military reservation of the United States, I had at first some doubt whether a civil court could take cognizance of the case at all; but, as crimes of this nature have repeatedly been made the subject of inquiry by civil tribunals, I have come to the conclusion that I ought not to decline to hear this complaint. Indeed, it is difficult to see how I could refuse to do so without abdicating that supremacy of the civil power which is a fundamental principle of the Anglo-Saxon polity. While there is no statute expressly conferring such jurisdiction, there is a clear recognition of it in the fifty-ninth article of war, which provides that "when any officer or soldier is accused of a capital crime, or of any offence against the person or property of any citizen of any of the United States, which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company, or detachment to which the person so accused belongs, are required (except in time of war), upon application duly made by or in behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending him and securing him, in order to bring him to trial." This article makes no exception of crimes committed by one soldier upon another, nor of cases where there is concurrent jurisdiction in the military courts. Tytler, in his work upon Military Law, says: "The martial or military law, as contained in the mutiny act and articles of war, does in no respect supersede or interfere with the civil or municipal laws of the realm. . . . Soldiers are, equally with all other classes of citizens, bound to the same strict observance of the laws of the country, and the fulfilment of all their social duties, and are alike amenable to the ordinary civil and criminal courts of the country for all offences against those laws, and breaches of those duties."

In the case of U. S. *v.* Cornell, 2 Mason, 61, 91, Mr. Justice Story took cognizance of a murder committed by one soldier upon another in Fort Adams, Newport harbor. The case was vigorously contested, and the point was made that the State courts had jurisdiction of the offence, but there was no claim that there was not jurisdiction in some civil tribunal. A like case was that of a murder committed in Fort Pulaski, at the mouth of the Savannah River, and tried in 1872 before Mr. Justice Woods and Judge Erskine. U. S. *v.* Carr, 1 Woods, 480. No question was raised as to the jurisdiction. The subject of the civil

responsibility of the army was very carefully considered by Attorney-General Cushing, in Steiner's Case, 6 Ops. Atty.-Gen. 413, and the conclusion reached that an act criminal both by military and general law is subject to be tried either by a military or civil court, and that a conviction or acquittal by the civil authorities of the offence against the general law does not discharge from responsibility for the military offence involved in the same facts. The converse of this proposition is equally true.

The character of the act involved in this case presents a more serious question. The material facts are undisputed. There is no doubt that the deceased was killed by the prisoner under the performance of a supposed obligation to prevent his escape by any means in his power. There is no evidence that the prisoner fired before the necessity for his doing so had become apparent. Stone was called upon several times to halt, with a hail by the quartermaster sergeant that there was "a load after him." Duff, his nearest pursuer, was not gaining upon him, and in another half-minute he would have scaled the two fences between him and the highway, and would probably have been lost in the houses that lie on the other side of the street. A court of inquiry, called for the purpose of fully investigating the circumstances, was of the opinion that if Clark had not performed his duty as efficiently as he did, by firing on deceased, he certainly would have effected his escape; and found that no further action was necessary in the case. The prisoner and the deceased had always been good friends, and it is at least doubtful whether Clark recognized him at the time of firing the fatal shot. The prisoner has heretofore borne a most excellent reputation, was never court-martialled nor punished, and was pronounced by all the witnesses who testified upon the subject to be an exceptionally good soldier. There is not the slightest reason to suppose that he was not acting in obedience to what he believed to be his duty in the premises. There was some conflicting testimony as to whether he was standing or kneeling at the time he fired, but I am not able to see its materiality. If he was authorized to shoot at all, he was at liberty to take such position as would insure the most accurate aim, whether his object was to hit the deceased in the leg or in the body. Clark says that he aimed low, for the purpose of merely disabling him, but, owing to a sudden descent in the ground, the shot took effect in the back instead of the leg. For the purpose of this examination, however, I am bound to presume that he intended to kill, as a man is always presumed to intend the natural and probable consequences of his acts. The case, then, reduces itself to the naked legal proposition whether the prisoner is excused in law in killing the deceased.

The general rule is well settled, by elementary writers upon criminal law, that an officer having custody of a person charged with felony may take his life, if it becomes absolutely necessary to do so to prevent his escape; but he may not do this if he be charged simply with a misdemeanor; the theory of the law being that it is better that a misdemean-

ant escape than that human life be taken. I doubt, however, whether this law would be strictly applicable at the present day. Suppose, for example, a person were arrested for petit larceny, which is a felony at the common law, might an officer under any circumstances be justified in killing him? I think not. The punishment is altogether too disproportioned to the magnitude of the offence. Perhaps, under the statute of this state, 2 How. St. § 9430, wherein a felony is "construed to mean an offence for which the offender, on conviction, shall be liable by law to be punished by death, or by imprisonment in the state prison," the principle might still be applied. If this statute were applicable to this case, it would operate as a justification, since Stone had been convicted and sentenced to hard labor in a military prison. Under the recent case of *Ex parte* Wilson, 114 U. S. 417, 5 Sup. Ct. Rep. 935, it was adjudged by the Supreme Court, upon full consideration, that a crime punishable by imprisonment for a term of years at hard labor was an "infamous crime," within the meaning of the Constitution.

Manifestly, however, the case must be determined by different considerations. Stone had been court-martialled for a military offence, in which there is no distinction between felonies and misdemeanors. His crime was one wholly unknown to the common law, and the technical definitions of that law are manifestly inappropriate to cases which are not contemplated in the discussion of common-law writers upon the subject. We are bound to take a broader view, and to measure the rights and liabilities of the prisoner by the exigencies of the military service, and the circumstances of the particular case. It would be extremely unwise for the civil courts to lay down general principles of law which would tend to impair the efficiency of the military arm, or which would seem to justify or condone conduct prejudicial to good order and military discipline. An army is a necessity — perhaps I ought to say an unfortunate necessity — under every system of government, and no civilized state in modern times has been able to dispense with one. To insure efficiency, an army must be, to a certain extent, a despotism. Each officer, from the general to the corporal, is invested with an arbitrary power over those beneath him, and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the term of his enlistment, and consents to come and go at the will of his superior officers. He agrees to become amenable to the military courts, to be disciplined for offences unknown to the civil law, to relinquish his right of trial by jury, and to receive punishments which, to the civilian, seem out of all proportion to the magnitude of the offence.

The articles of war, which he takes an oath, upon his enlistment, to observe, are in fact a military code of Draconic severity, and authorize harsh punishments for offences which seem to be of a trivial nature. Thus, by the articles of war, all the following crimes are punishable by death, or such other punishment as a court-martial may direct: striking a superior officer; drawing or lifting up a weapon, or offering any

violence against him; or disobeying any lawful command. Article 21. Exciting or joining in any mutiny or sedition. Article 22. Failing to use his utmost endeavors to suppress such mutiny or sedition, or failing to give information thereof to his commanding officer. Article 23. A sentinel sleeping upon his post or leaving it before he is relieved. Article 39. Occasioning false alarms in camp or quarters. Article 41. Misbehaving himself before the enemy, running away, or shamefully abandoning any post which he is commanded to defend; speaking words inducing others to do the like; casting away his arms or ammunition, or quitting his post or colors to plunder or pillage. Article 42. Compelling the commander of any post to surrender it to the enemy, or to abandon it. Article 43. Making known the watchword to any person not entitled to receive it, or giving the watchword different from that which he has received. Article 44. Relieving the enemy with money, victuals, or ammunition, or harboring or protecting an enemy. Article 45. Holding correspondence or giving intelligence to an enemy. Article 46. Deserting in time of war. Article 47. Advising or persuading another to desert in time of war. Article 51. Doing violence to any person bringing provisions or other necessaries to camp or quarters of troops in foreign parts. Article 56. Forcing a safeguard in a foreign territory or during a rebellion. Article 57. Some of these articles are applicable only to a state of war, but some of them treat of offences which may equally well be committed in time of peace. Besides these, there are a number of minor offences punishable as a court-martial may direct, and a general and very sweeping article (No. 62) providing that all crimes not capital, and all disorders and neglects to the prejudice of good order and military discipline, shall be justiciable by a court-martial, and punishable at the discretion of the court.

Now, while the punishment in Stone's case seems to the civilian quite disproportionate to the character of his offence, as charged in the specifications, which was no more nor less than the utterance of a malicious falsehood, when gauged by the penalties attached by Congress to the several offences contained in the articles of war, it does not seem so excessive; at any rate, it was the lawful judgment of a court having jurisdiction of his case, and it was his duty to abide by it, or pursue his remedy in the method provided by law. In seeking to escape, the deceased was undoubtedly guilty of other conduct prejudicial to good order and military discipline, and was liable to such further punishment as a court-martial might inflict. In suffering him to escape, the prisoner became amenable to article 69, and, failing to use his utmost endeavor to prevent it, was himself subject to such punishment as a court-martial might direct. Did he exceed his authority in using his musket?

I have made the above citations from the military code to show that the common-law distinction between felonies and misdemeanors is of no possible service in gauging the duty of a military guard with respect to a soldier in the act of escaping. His position is more nearly analogous to that of an armed sentinel stationed upon the walls of a penitentiary

to prevent the escape of convicts. The penitentiary — and for this purpose we may use the house of correction in Detroit as an example — may contain convicted murderers, felons of every grade, as well as others charged with vagrancy or simple breaches of the peace, and criminals of all descriptions between the two. If the guard sees one of those prisoners scaling the wall, and there be no other means of arresting him, may he not fire upon him without stopping to inquire whether he is a felon or a misdemeanant? If he prove to be a felon, he will be fully justified; if he prove to be a misdemeanant, is he therefore guilty of murder? There are undoubtedly cases where a person who has no malice in fact may be charged with malice in law, and held guilty of murder through a misapprehension of the law. Thus, if a sheriff charged with the execution of a malefactor by hanging should carry out the sentence by shooting or beheading; or, commanded to hang upon a certain day, should hang upon another day; or if an unauthorized person should execute the sentence, — it would probably be murder at common law. But these cases are an exception to the general rule, that actual malice must exist to justify a conviction for murder. While human life is sacred, and the man who takes it is held strictly accountable for his act, a reputable citizen, who certainly does not lose his character as such by enlisting in the army, ought not to be branded as a murderer upon a mere technicality, unless such technicality be so clear as to admit of no reasonable doubt. Thus, if a sentinel stationed at the gate of a fort should wantonly shoot down a civilian endeavoring to enter in the daytime, or an officer should recklessly slay a soldier for some misconduct or breach of discipline, no supposed obligation upon his part to do this would excuse so gross an outrage.

In this connection it is urged by the defence that the finding of the court of inquiry acquitting the prisoner of all blame is a complete bar to this prosecution. I do not so regard it. If the civil courts have jurisdiction of murder, notwithstanding the concurrent jurisdiction by court-martial of military offences, it follows logically that the proceedings in one cannot be pleaded as a bar to proceedings in the other; and if the finding of such court should conflict with the well-recognized principles of the civil law, I should be compelled to disregard it. State v. Rankin, 4 Cold. 145. At the same time I think that weight should be given, and in a case of this kind great weight, to the finding, as an expression of the opinion of the military court of the magnitude of Stone's offence, and of the necessity of using a musket to prevent his escape. I am the more impressed with this view from the difficulty of applying common law principles to a case of this description. There is a singular and almost total absence of authority upon the subject of the power of a military guard in time of peace. But considering the nature of military government, and the necessity of maintaining good order and discipline in a camp, I should be loth to say that life might not be taken in suppressing conduct prejudicial to such discipline.

In charging the jury in U. S. v. Carr, 1 Woods, 484, Mr. Justice

Woods instructed them to "inquire whether, at the moment he fired his piece at the deceased, with his surroundings at that time, he had reasonable ground to believe, and did believe, that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder which threatened speedily to ripen into a mutiny. If he had reasonable ground so to believe, and did so believe, then the killing was not unlawful. . . . But it must be understood that the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required."

So, in the case of McCall v. McDowell, 1 Abb. (U. S.) 212, 218, it is said that "except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law should excuse the military subordinate when acting in obedience to the order of his commander. Otherwise he is placed in the dangerous dilemma of being liable in damages to third persons for obedience to an order, or to the loss of his commission and disgrace for disobedience thereto. . . . The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in the army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as he may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions." It is true this was a civil case for false imprisonment, and these observations were made with reference to a question of malice, which was material as bearing upon the plaintiff's right to punitory damages, as it is also a necessary ingredient in the definition of murder.

The question of the civil responsibility of a naval officer (and his criminal responsibility seems to be the same) was considered by the Supreme Court in Wilkes v. Dinsman, 7 How. 89, which was an action of trespass against Commodore Wilkes for causing the plaintiff to be whipped and imprisoned for disobedience of orders, near the Sandwich Islands. In discussing the responsibility of the commanding officer of a vessel of war, Mr. Justice Woodbury observed: "In respect to those compulsory duties, whether in re-enlisting or detaining on board, or in punishing or imprisoning on shore, while arduously endeavoring to perform them in such a manner as might advance the science and commerce and glory of his country, rather than his own personal designs, a public officer, invested with certain discretionary powers, never has been, and never should be, made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty. . . . The officer, being intrusted with a discretion for public purposes, is not to be punished for the exercise of it, unless it is first proved against him, either that he exercised the power

confided to him in cases without his jurisdiction, or in a manner not confided to him, as, with malice, cruelty, or wilful oppression, or, in the words of Lord Mansfield, that he exercised it as if 'the heart is wrong.' In short, it is not enough to show that he committed an error in judgment, but it must have been a malicious and wilful error."

The same principle was applied in the criminal case of Riggs *v.* State, 3 Cold. 85. Riggs was a private soldier who had been convicted of murder in killing a man while acting under the orders of his superior officer. The court held that an order illegal in itself, and not justifiable by the rules and usages of war, so that a man of ordinary sense and understanding would know, when he heard it read or given, that the order was illegal, would afford the private no protection for a crime under such order; but that an order given by an officer to his private which does not expressly and clearly show on its face, or the body thereof, its own illegality, the soldier would be bound to obey, and such order would be a protection to him.

I have no doubt the same principle would apply to the acts of a subordinate officer, performed in compliance with his supposed duty as a soldier; and unless the act were manifestly beyond the scope of his authority, or, in the words used in the above case, were such that a man of ordinary sense and understanding would know that it was illegal, that it would be a protection to him, if he acted in good faith and without malice. As there is no reason in this case to suppose that Clark was not doing what he conceived to be his duty, and the act was not so clearly illegal that a reasonable man might not suppose it to be legal, — indeed, I incline to the opinion that it was legal, — and as there was an entire absence of malice, I think he ought to be discharged.

But, even if this case were decided upon common-law principles, the result would not be different. By the statutes of the State in which the homicide was committed, a felony is defined to be any crime punishable by imprisonment in the State's prison. Stone had been convicted of a military offence, and sentenced to hard labor in the military prison for two years, and, so far as the analogies of the common law are applicable at all, he must be considered, in a case of this kind, as having been convicted of a felony.

It may be said that it is a question for a jury, in each case, whether the prisoner was justified by the circumstances in making use of his musket, and if this were a jury trial I should submit that question to them; but as I am bound to find as a matter of fact that there is reasonable cause to believe the defendant guilty, not merely of a homicide, but of a *felonious* homicide, and as I would, acting in another capacity, set aside a conviction, if a verdict of guilty were rendered, I shall assume the responsibility of directing his discharge.[1]

[1] See also Com. *v.* Shortall, 206 Pa. 165. — Ed.

SECTION II.

Authority to Act.

HANDCOCK v. BAKER.

COMMON PLEAS, 1800.

[*Reported* 2 *B. & P.* 260.]

TRESPASS for breaking the plaintiff's dwelling house and assaulting him therein, and dragging him out of bed, and forcing him without clothes out of his house along the public street, and beating and imprisoning him without cause.

Two of the defendants suffered judgment by default, and the other two pleaded, 1st, not guilty: 2dly, that the plaintiff in the said dwelling house broke the peace and assaulted his wife, and purposed to have feloniously killed and slain her, and was on the point of so doing; and that her life being in great danger she cried murder and called for assistance; whereupon the defendants, for the preservation of the peace, and to prevent the plaintiff from so killing and slaying his wife, and committing the said felony, endeavored to enter by the door, and knocked thereat; and because the same was fastened, and there was reasonable cause to presume that the wife's life could not have been otherwise preserved than by immediately breaking open the door and entering the said dwelling house, and they could not otherwise obtain possession, they did for that purpose break and enter the said dwelling house, and somewhat break, etc., doing as little damage as possible, and gently laid hands on the plaintiff, and prevented him from further assaulting and feloniously killing and slaying his said wife; and for the same purpose and also for that of taking and delivering the plaintiff to a constable, to be by him taken before a justice, and dealt with according to law, kept and detained him a short and reasonable time in that behalf, and because he had not then proper and reasonable clothes on him, took their hands off from him, and permitted him to enter a bed-chamber, and to remain there a reasonable time, that he might put on such clothes, which he might have done; and because he did not nor would so do, but wholly refused and went into bed there, and remained there at the end of such reasonable time, and would not

quit the same, although thereto requested, the defendants for the same purposes as they so kept and detained the plaintiff as above-mentioned, there being then no reasonable ground for presuming that he had changed his purpose of further assaulting and feloniously slaying his said wife, entered the bed-chamber in order for those purposes to take him therefrom, whereupon the plaintiff assaulted and would have beat the said defendants if they had not defended themselves, which they did, and if any damage happened to the plaintiff it was occasioned by his own assault, and the defendants for the purposes in that behalf aforesaid, gently laid hands upon the plaintiff and took him from the bed and out of the dwelling house along the public streets for a reasonable time, and kept and detained him for a short and reasonable time for those purposes, till they could find a constable, and as soon as they could find a constable delivered him to the constable for the purpose in that behalf aforesaid.

The plaintiff replied *de injuria sua propria*, and by way of new assignment pleaded, that he sued out his writ and declared as well for the trespasses justified, as also for that the defendants at the times when, etc., beat and ill-treated the plaintiff with much greater violence and imprisoned him for a longer time than was necessary and proper for any of the purposes in the plea mentioned.

Issue having been joined on the replication and new assignment, the cause was tried before *Grose*, J., at the last spring assizes for Norfolk, when the jury found for the plaintiff on the general issue, and for the defendants on the special justification.

In Easter term last a rule *Nisi* was obtained calling on the defendants to show cause why the judgment for the defendants on the special justification should not be arrested, and a verdict entered for the plaintiff on the general issue, with 1*s*. damages.

Lord Eldon, C. J. If the reasoning be good that a wife ought to apply for assistance to those courts where the law has provided assistance for her, it will equally apply to the first entry of the house by the defendants, as to the subsequent assault and imprisonment which is stated to have taken place in the bedroom. I think, however, that a wife is only bound to apply to those remedies, where it is probable that the injury to be apprehended will be prevented by such application. In this case the plaintiff being about to commit a felony by killing and slaying his wife, the defendants interfered by breaking and entering the house in order to prevent the execution of that intent: and "for the same purposes," that is, with a view to prevent the plaintiff from killing and slaying his wife, they afterwards committed the injury complained of in the bedroom, into which they had permitted him to enter in order to put on necessary clothes. It is stated that there was no reasonable ground for presuming that the plaintiff had changed his purpose; and it is argued that it ought to have been averred that his purpose actually continued: but if the preceding allegation be true,

that the defendants entered the bedroom for the same purposes for which they had previously entered the house, the latter allegation was unnecessary; since the averment that it was for the same purposes sufficiently brought the question before the jury, Whether or not the defendants went into the bed-chamber and detained the plaintiff for the purpose of preventing him from killing and slaying his wife? It is not difficult to conceive that under some circumstances it might be more especially the defendant's duty to interfere in that manner. Suppose A endeavor to lay hold of B who is in pursuit of C with an intent to kill him, and B thereupon ceases to pursue with the view of effecting his purpose with more cunning, the act of ceasing to run, so far from being evidence of an intention to desist from his purpose, might afford strong evidence of an intention to prosecute it with more effect; in which case the detention of B would be justified. In this case the jury were competent to consider whether under all the circumstances of the case, including the presence or absence of the wife, the plaintiff got into bed with a view of more effectually executing his intent to kill his wife. In fact the jury have found that the defendants kept and detained the plaintiff after he had gone into the bedroom for the same purposes for which they kept and detained him before. With respect to the averment which has been supposed to be necessary, it is sufficient to answer, that after verdict it must be presumed that everything is proved which is necessary to support the verdict; and the jury have found that it was necessary for the preservation of the woman's life that the defendants should do what they did.

HEATH, J. I am of the same opinion. It is a matter of the last consequence that it should be known upon what occasions bystanders may interfere to prevent felony.[1] In the riots which took place in

[1] Indeed there seems to be very high authority for the interference of private individuals in case of riot, though no felony be committed. The question underwent a very solemn discussion in 1597 (39 Eliz. at which time the country was in a very unquiet state,) before all the judges in a case which is called "Case of armes," *Poph:* 121, and is as follows: "Upon an assembly of all the justices and barons at Sergeant's Inn this term, on Monday the 15th day of April, upon this question moved by *Anderson*, C. J., of the Common Bench; Whether men may arm themselves to suppress riots, rebellions, or to resist enemies and to endeavour themselves to suppress or resist such disturbers of the peace or quiet of the realm? And upon good deliberation it was resolved by them all, that every justice of peace, sheriff and other minister or other subject of the king where such accident happen may do it; and to fortify this their resolution, they perused the statute of 2 Ed. 3. 3. which enacts, that none be so hardy as to come with force or bring force to any place in affray of the peace, nor to go or ride armed night nor day, unless he be a servant to the king in his presence, and the ministers of the king in the execution of his precepts, or of their office and those who are in their company assisting them, or upon cry made for weapons to keep the peace, and this in such places where accidents happen, upon the penalty in the same statute contained; whereby it appeareth that upon cry made for weapons to keep the peace, every man where such accidents happen for breaking the peace, may by the law arm himself against such evil-doers to keep the peace. But they take it to be the more discreet way for every one in such

the year 1780, this matter was much misunderstood, and a general persuasion prevailed that no indifferent person could interpose without the authority of a magistrate; in consequence of which much mischief was done, which might otherwise have been prevented. In this case the defendants broke and entered the plaintiff's house in order to prevent the commission of murder, and that seems to have been admitted to be a good justification. The only dispute therefore turns on the propriety of their conduct towards the plaintiff after they had suffered him to go into the bedroom. Now I think that enough is stated in the justification to support the verdict, since the jury have thought that the conduct of the defendants was right. After verdict we may suppose anything. We may suppose that the plaintiff's passion continued, and that he again declared that he would kill his wife.

ROOKE, J. I am of the same opinion. It is highly important that bystanders should know when they are authorized to interfere. In this case the life of the wife was in danger from the act of the husband. The defendants therefore were justified in breaking open the house, and doing what was necessary for the preservation of her life. The jury find that they have done this.

CHAMBRE, J. There is a great difference between the right of a private person in cases of intended felony and of breach of the peace. It is lawful for a private person to do anything to prevent the perpetration of a felony. In this case it is stated that the plaintiff purposed feloniously to kill and slay his wife, to prevent which the defendants interfered in the manner stated in the plea. The justification has been found by the verdict; and the defendants therefore are entitled to the judgment of the court.

Rule discharged.

a case to attend and be assistant to the justices, sheriffs, or other ministers of the king in the doing of it." This case is spoken of with approbation by the judges in the great case of Messenger and others, Kel. 76, and its principle is adopted by Hawkins in his pleas of the crown, *lib.* 1, c. 65, s. 11, where he says, "it hath been holden that private persons may arm themselves in order to suppress a riot, from whence it seems clearly to follow that they may also make use of arms in the suppressing of it if there be a necessity for so doing." He adds indeed, that it seems hazardous for private persons to go so far in common cases, and that such violent methods seem only proper against such riots as savour of rebellion.

REX v. SMITH.

OLD BAILEY. 1804.

[*Reported* 1 *Russ. Cr. & M.* 458.]

THE neighborhood of Hammersmith had been alarmed by what was supposed to be a ghost; the prisoner went out with a loaded gun to take the ghost; and, upon meeting with a person dressed in white, immediately shot him.

M'DONALD, C. B., ROOKE and LAWRENCE, JJ., were clear that this was murder, as the person who appeared as a ghost was only guilty of a misdemeanor; and no one might kill him, though he could not otherwise be taken.

POND v. PEOPLE.

SUPREME COURT OF MICHIGAN, 1860.

[*Reported* 8 *Mich.* 150.]

THE plaintiff in error was tried on an information for the murder of one Isaac Blanchard, and convicted of manslaughter.[1]

CAMPBELL, J. The essential difference between excusable and justifiable homicide rests not merely in the fact that at common law the one was felonious, although pardoned of course, while the other was innocent. Those only were justifiable homicides where the slayer was regarded as promoting justice, and performing a public duty; and the question of personal danger did not necessarily arise, although it does generally.

It is held to be the duty of every one who sees a felony attempted by violence, to prevent it if possible; and in the performance of this duty, which is an active one, there is a legal right to use all necessary means to make the resistance effectual. Where a felonious act is not of a violent or forcible character, as in picking pockets, and crimes partaking of fraud rather than force, there is no necessity, and therefore no justification, for homicide, unless possibly in some exceptional cases. The rule extends only to cases of felony; and in those it is lawful

[1] The evidence, except so far as it is stated in the opinion, and part of the opinion in which the question of self-defense is discussed, are omitted. — ED.

to resist force by force. If any forcible attempt is made, with a felonious intent against person or property, the person resisting is not obliged to retreat, but may pursue his adversary, if necessary, till he finds himself out of danger. Life may not properly be taken under this rule where the evil may be prevented by other means within the power of the person who interferes against the felon. Reasonable apprehension, however, is sufficient here, precisely as in all other cases.

It has also been laid down by the authorities, that private persons may forcibly interfere to suppress a riot or resist rioters, although a riot is not necessarily a felony in itself. This is owing to the nature of the offense, which requires the combination of three or more persons, assembling together and actually accomplishing some object calculated to terrify others. Private persons who cannot otherwise suppress them, or defend themselves from them, may justify homicide in killing them, as it is their right and duty to aid in preserving the peace. And perhaps no case can arise where a felonious attempt by a single individual will be as likely to inspire terror as the turbulent acts of rioters. And a very limited knowledge of human nature is sufficient to inform us, that when men combine to do an injury to the person or property of others, of such a nature as to involve excitement and provoke resistance, they are not likely to stop at half way measures, or to scan closely the dividing line between felonies and misdemeanors. But when the act they meditate is in itself felonious, and of a violent character, it is manifest that strong measures will generally be required for their effectual suppression; and a man who defends himself, his family, or his property, under such circumstances, is justified in making as complete a defense as is necessary.

When we look at the facts of this case, we find very strong circumstances to bring the act of Pond within each of the defenses we have referred to. Without stopping to recapitulate the testimony in full or in detail, we have these leading features presented: Without any cause or provocation given by Pond, we find Plant, Robilliard, and Blanchard, combining with an expressed intention to do him personal violence. On Thursday evening this gang, with from fifteen to twenty associates, having been hunting for Pond, found him at a neighbor's, and having got him out of doors, surrounded him, while Plant struck him with his fist, and kicked him in the breast, with insulting language, evidently designed to draw him into a fight. He escaped from them, and ran away into the woods, and succeeded in avoiding them that night. The same night they tore down the door of the net-house, where his servants were asleep, in search of him; and not finding him there, went to the house, the whole rabble being with them, and wanted Pond, and expressed themselves determined to have him; but refused to tell his wife what they wanted of him. Not finding him there, they started off elsewhere in search of him. This was between nine and ten o'clock at night. About noon of Friday, Plant and Blanchard met Pond, when

Plant threatened again to whip him; and then went up to him, told him not to say anything, and that if he did he would give him slaps or kicks. Plant then took a stone in his hand, and threatened if Pond spoke, to throw it at him. Pond said nothing, but went home quietly, and Plant went off and was heard making further threats soon after. Friday night neither Pond nor his family went to bed, being in fear of violence. Between one and two o'clock that night, Plant, Robilliard, and Blanchard went to the net-house, and partially tore it down, while Whitney and Cull were in it. They then went to the house where Pond, his wife, and children were, shook the door, and said they wanted Pond. Pond concealed himself under the bed, and his wife demanded what they wanted of him, saying he was not there; when Plant shook the door again, and ordered Mrs. Pond to open it, saying they wanted to search the house. She refusing, they resorted to artifice, asking for various articles of food, and objecting to receiving them except through the door. Plant then repeatedly commanded her to open the door, saying if she did not, she would regret it. On opening the door from six to twelve inches, by sliding the cord, to hand them some sugar, which they demanded, they did not take the sugar, but Plant seized Mrs. Pond's arm, and squeezed it until she fainted. Not succeeding in getting into the house, they then left for Ward's, and Pond went to the house of his brother-in-law, and borrowed a double-barreled shot gun loaded with pigeon shot, and returned home. While at Ward's Blanchard told the latter that they had torn down part of Pond's net-house, and had left the rest so that when they went back they would have the rest of the fun. Blanchard also said, "I want to see Gust. Pond: he abused an Irishman, and I want to abuse him just as bad as he abused the Irishman. Pond has to be abused any way." He also said to Ward, "This is good bread, I don't know but it may be the last piece of bread I'll eat." Plant also made threats. A short time after returning, they were heard to say they were going back again; were going to find him and to whip him, or have the soul out of him. It is to be remarked that we have their language as rendered by an interpreter, who was evidently illiterate, or at least incompetent to translate into very good English; and it is impossible for us to determine the exact force of what was said.

The party then went back to Pond's, and asked admittance to search for him. His wife refused to let them in. They immediately went to the net-house, where Cull was asleep. Plant seized Cull, and pulled him out of bed on the floor, and began choking him. Cull demanded who it was, but received no answer. Blanchard and Robilliard had commenced tearing down the boards. Pond went to the door and hallooed, "Who is tearing down my net-house?" to which there was no answer. The voices of a woman and child were heard crying, and the woman's voice was heard twice to cry out "for God's sake!" Cull's voice was also heard from the net-house, not speaking, but hallooing

as if he was in pain. Pond cried out loudly, "leave or I'll shoot." The noise continuing, he gave the same warning again, and in a few seconds shot off one barrel of the gun. Blanchard was found dead the next morning. Pond took immediate steps to surrender himself to justice.

A question was raised whether the net-house was a dwelling or a part of the dwelling of Pond. We think it was. It was near the other building, and was used not only for preserving the nets which were used in the ordinary occupation of Pond, as a fisherman, but also as a permanent dormitory for his servants. It was held in The People *v.* Taylor, 2 Mich. 250, that a fence was not necessary to include buildings within the curtilage, if within a space no larger than that usually occupied for the purposes of the dwelling and customary outbuildings. It is a very common thing in the newer parts of the country, where, from the nature of the materials used, a large building is not readily made, to have two or more small buildings, with one or two rooms in each, instead of a large building divided into apartments.

We cannot, upon a consideration of the facts manifest from the bill of exceptions, regard the charges asked by the defense as abstract or inapplicable to the case. It was for the jury to consider the whole chain of proof; but if they believed the evidence as spread out upon the case, we feel constrained to say that there are very few of the precedents which have shown stronger grounds of justification than those which are found here. Instead of reckless ferocity, the facts display a very commendable moderation.

Apart from its character as a dwelling, which was denied by the court below, the attack upon the net-house for the purpose of destroying it was a violent and forcible felony. And the fact that it is a statutory and not common law felony, does not, in our view, change its character. Rape and many other of the most atrocious felonious assaults, are statutory felonies only, and yet no one ever doubted the right to resist them unto death. And a breaking into a house with the design of stealing the most trifling article, being common law burglary, was likewise allowed to be resisted in like manner, if necessary. We think there is no reason for making any distinctions between common law and statute felonies in this respect, if they are forcible and violent. So far as the manifest danger to Pond himself, and to Cull, is concerned, the justification would fall within the common law.

REGINA v. MURPHY.

MEATH ASSIZES. 1839.

[*Reported* 1 *Crawford & Dix*, 20.]

THE prisoner was indicted under the statute 7 Will. IV. & 1 Vict. c. 85, for that a certain gun then and there loaded with gunpowder and divers leaden shot, which said gun he the said P. M., in both his hands, then and there had and held, at and against one Christopher Hand, then and there feloniously, unlawfully, and maliciously did shoot, with intent in so doing thereby then and there the said C. H. to disfigure, to disable, and to do some grievous bodily harm.

It appeared that on the day in question the prisoner, who was a game-keeper and woodranger of Lord Dunsany, and armed with a fowling-piece, detected the prosecutor in the act of carrying away from his employer's lands a bundle of sticks, consisting of branches severed from the growing timber by a recent storm; that the prosecutor being apparently about to pass over a ditch and hedge upon the same lands, the prisoner cried out to him, "Have you no other way of going but breaking the hedge?" that the prosecutor made no reply, but instantly dropped the wood and leaped the ditch; that the prisoner thereupon said, "If you don't stop I'll fire;" that the prosecutor still going on, the prisoner discharged his piece and wounded the prosecutor in the head, back, and arms. When the prosecutor felt himself wounded he said to the prisoner, who had come up with him, "I did not think you would have done it;" to which the latter replied, "I would do that and worse to you."

W. Gorman, for the prisoner, submitted that, under the circumstances, he (the prisoner) was entitled to an acquittal; that he, being the woodranger of the owner of the soil, had an equal right to defend the property thereon; and that, having detected the prisoner in the act of committing a felony, by carrying off the dissevered timber, he had made use of the only means in his power for the purpose of arresting the felon.

Tickell, Q. C., for the Crown. The prosecutor was a mere trespasser.

DOHERTY, C. J. He was something more than a trespasser; there is no doubt that the prosecutor, in carrying away the branches, previously dissevered from the trees, was committing a felony, and the prisoner was clearly entitled to arrest him; but in discharging his gun at the prosecutor, and perilling his life, the prisoner has very much exceeded his lawful powers, and I cannot allow it to go abroad that it is lawful to fire upon a person committing trespass and larceny, for that would be punishing, perhaps with death, offences for which the law has provided milder penalties. It appears, moreover, that the expressions addressed by the prisoner to the prosecutor had reference rather to the acts of trespass than the felony. *Verdict, Guilty.*

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BURNS v. ERBEN.

COURT OF APPEALS, NEW YORK, 1869.

[*Reported* 40 *N. Y.* 463.]

WOODRUFF, J. By section 8 of the act to establish a Metropolitan Police District, passed April 15th, 1857 (chap. 569 of Laws of 1857), the members of the police force of that district are given "in every part of the State of New York, all the common law and statutory powers of constables, except for the service of civil process." And in the amendatory act passed April 10, 1860 (chap. 259 of Laws of 1860), it is declared in the 28th section, that the members of the police force of that district "shall possess in every part of the State all the common law and statutory powers of constables, except for the service of civil process."

In pursuance of information given by the defendant, Erben, the defendant, Frost, accompanied by Erben, arrested the plaintiff without warrant, took her to the police station, where she was detained a few minutes, and after some conversation with the officer in charge, she was permitted to return to her residence. For this she has brought the present action for false imprisonment.

A felony had been committed that evening, at the house of Mr. Henry Erben, the defendant's father. On that point there is no dispute or conflict. The plaintiff had visited the house that evening, and, according to the information upon which the defendant acted, was the only person not a member of the family, who had been in the basement. Silver had been stolen from the basement. It was there when the plaintiff entered and until after 8 o'clock; and it was missed very shortly after she left the house. Of these facts the proof was distinct and without contradiction.

Upon a report of these facts, Frost, accompanied by the defendant, Erben, made the arrest as above stated.

The inquiry is, therefore, whether under the statutes above cited and the common law rule in respect of arrests made or aided by private persons, the plaintiff was entitled to recover. There were no facts in dispute requiring the submission of any question to the jury, unless it be held that there was no justification.

I have no doubt upon the subject. The writers upon criminal law and the reported cases, so far as I have examined them, hold uniform language.

Lord Tenterden, C. J., in Beckwith *v.* Philby (6 Barn. & Cress., 635), says: "The only question of law in this case is, whether a constable, having a reasonable cause to suspect that a person has committed a felony, may detain such person until he can be brought before a justice of the peace to have his conduct investigated. There is this distinction between a private individual and a constable; in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities." (See Hawk. P. C., book 2, chap. 12, 13; 1 Russell on Crime, 594, 5; Steph. Cr. L., 242, 3; 1 Chit. Cr. L., 15, 17; Samuel *v.* Payne, Doug. 358; Lawrence *v.* Hedger, 3 Taunt. 14; Regina *v.* Toohy, 2 Ld. Raymond, 130; Hobbs *v.* Brandscomb, 3 Camp. 420; Davis *v.* Russell, 5 Bing. 354; Cowles *v.* Dunbar, 2 Car. and P. 565.)

In Ledwith *v.* Catchpole (Cad. Cas., 291, and 1st Burns, Justice, p. 130, 1), Lord Mansfield says, in an action against the officer: "The question is, whether a felony has been committed or not. And then the fundamental distinction is, that if a felony has actually been committed, a private person may, as well as a police officer, arrest; if not, the question always turns upon this, was the arrest *bona fide*? Was the act done fairly and in pursuit of an offender, or by design, or malice, or ill will? . . . It would be a terrible thing, if, under probable cause, an arrest could not be made . . . ; many an innocent man has and may be taken up upon suspicion; but the mischief and inconvenience to the public in this point of view, is comparatively nothing; it is of great consequence to the police of the country."

The justification of an arrest by a private person was made in Allen *v.* Wright (8 Car. and Payne, 522), to depend on first, the fact that a felony had been actually committed; and second, that the circumstances were such that a reasonable person, acting without passion and prejudice, would have fairly suspected the plaintiff of being the person who did it.

These principles are affirmed in this State in Mix *v.* Clute (3 Wend. 350), in very distinct terms. "If a felony has been committed by the person arrested, the arrest may be justified by any person without warrant. If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another which he had reason to believe."

The fact being proved in this case that a felony had in fact been committed, I have no hesitation in saying that, however unfortunate it was to the plaintiff, the circumstances fully justified the suspicion which led to her arrest. It is claimed that these circumstances should have been submitted to the jury. Not so; a verdict finding no reasonable ground of suspicion would have been against evidence. There was no conflict of testimony, and that the arrest was made without malice, in good faith, and upon reasonable grounds, is to my mind incontrovertible.

The appeal appears to me to have been taken upon a misapprehension of the construction and effect of the statutes conferring power on the policeman. I think the power perfectly clear, and I notice that the rules and regulations of the board of police are in conformity therewith; and it is made the duty of the officer to take the arrested person immediately before the Police Court, or if made at night or when the courts are not open, immediately to the station house, where the officer on duty is required to examine whether there is reasonable ground for the complaint, and if so, to cause the party to be taken before the court the next morning. Under such a system, innocent parties may sometimes be subjected to inconvenience and mortification; but any more lax rules would be greatly dangerous to the peace of the community and make the escape of criminals frequent and easy.

The judgment should be affirmed.

All the judges concurring.

Judgment affirmed.

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444 f f 2

TILLMAN *v.* BEARD.

SUPREME COURT OF MICHIGAN, 1899.

[*Reported* 121 *Mich.* 475.]

GRANT, C. J. The declaration contains four counts, and alleges assault and battery, false imprisonment, and malicious prosecution.

Plaintiff was a vender of popcorn and peanuts. He had a machine 5 feet 2 inches long, 2½ feet wide, and about 5½ feet high. The machinery was operated by steam generated by a gasoline burner. Plaintiff had obtained permission from a merchant in the village of Morrice to put his stand in the street in front of his store. There was

an ordinance prohibiting the exercise of his vocation without taking out a license. He had taken out no license. The defendant was president of the village. He found plaintiff located as above stated, without a license. He took hold of his machine, ran it out into the street, and ordered the village marshal to arrest plaintiff. The marshal arrested him, and took him to jail, where he was confined about three hours. He was then released.[1] . . .

The first arrest, without a complaint and warrant, was illegal. Officers are justified in arresting without a warrant only in cases of felony and breaches of the peace. This is elementary. It is needless to cite authorities. Plaintiff was engaged in no act dangerous to the public, or liable to cause disturbance upon the streets. The act was not *malum per se*, but only *malum prohibitum*. There was no danger of escape. There was no obstruction in the public highway requiring immediate removal for the convenience of the public. The respondent may have acted in good faith in ordering the arrest of plaintiff, but he certainly acted hastily, and without any legal authority. The statute did not give him, as conservator of the peace, the authority to imprison citizens of the village in this summary manner. By ordering the arrest, he made himself responsible for it, and liable for all its consequences. Webb, Pol. Torts, 264, and authorities there cited; Veneman *v.* Jones, 118 Ind. 41; Gilbert *v.* Emmons, 42 Ill. 143.

STOREY *v.* STATE. 445 F 2

SUPREME COURT OF ALABAMA. 1882.

[*Reported* 71 *Ala.* 329.]

THE defendant was convicted of the murder of Josiah Hall. To the refusal to give certain charges to the jury the defendant excepted.[2]

SOMERVILLE, J. . . . The record contains some evidence remotely tending to show that the prisoner was in pursuit of the deceased for the purpose of recapturing a horse, which the deceased had either stolen, acquired by fraud, or else unlawfully converted to his own use.

If the property was merely converted, or taken possession of in such manner as to constitute a civil trespass, without any criminal intent, it would not be lawful to recapture it by any exercise of force which would

[1] Only so much of the opinion as deals with this arrest is given. — ED.

[2] This short statement is substituted for that of the reporter. Part of the opinion only is given. — ED.

amount even to a breach of the peace, much less a felonious homicide. — Street *v.* Sinclair, 71 Ala. 110; Burns *v.* Campbell, 71 Ala. 271.

Taking the hypothesis that there was a larceny of the horse, it becomes important to inquire what would then be the rule. The larceny of a horse is a felony in this State, being specially made so by statute, without regard to the value of the animal stolen. — Code, 1876, § 4358. The fifth charge requested by the defendant is an assertion of the proposition that if the horse was feloniously taken and carried away by the deceased, and there was an apparent necessity for killing deceased in order to recover the property and prevent the consummation of the felony, the homicide would be justifiable. The question is thus presented, as to the circumstances under which one can kill in order to prevent the perpetration of a larceny which is made a felony by statute — a subject full of difficulties and conflicting expressions of opinion from the very earliest history of our common-law jurisprudence. The broad doctrine intimated by Lord COKE was, that a felon may be killed to prevent the commission of a felony without any inevitable cause, or as a matter of mere choice with the slayer. — 3 Inst. 56. If such a rule ever prevailed, it was at a very early day, before the dawn of a milder civilization, with its wiser system of more benignant laws; for Blackstone states the principle to be, that "where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting." 4 Com. 181. The reason he assigns is, that the law is too tender of the public peace and too careful of the lives of the subjects to "suffer, with impunity, any crime to be prevented by death, unless the same, if committed, would also be punished by death." It must be admitted that there was far more reason in this rule than the one intimated by Lord COKE, although all felonies at common law were punishable by death, and the person killing, in such cases, would seem to be but the executioner of the law. Both of these views, however, have been repudiated by the later authorities, each being to some extent materially modified. All admit that the killing can not be done from mere choice; and it is none the less certain that the felony need not be a capital one to come within the scope of the rule. Gray *v.* Combs, 7 J. J. Marsh. 458; Cases on Self-Defence (Horr. & Thomp.), 725, 867; Oliver *v.* The State, 17 Ala. 587; Carroll *v.* The State, 23 Ala. 28.

We find it often stated, in general terms, both by text writers and in many well considered cases, that one may, as Mr. Bishop expresses it, "oppose another who is attempting to perpetrate any felony, to the extinguishment, if need be, of the felon's existence." — 1 Bish. Cr. Law, §§ 849–50; The State *v.* Rutherford, 1 Hawks, 457. It is observed by Mr. Bishop, who is an advocate of this theory, that "the practical carrying out of the right thus conceded, is, in some circumstances, dangerous, and wherever admitted, it should be carefully guarded." 1 Bish. Cr. Law, § 855.

After a careful consideration of the subject we are fully persuaded that the rule, as thus stated, is neither sound in principle, nor is it supported by the weight of modern authority. The safer view is that taken by Mr. Wharton, that the rule does not authorize the killing of persons attempting secret felonies, not accompanied by force. — Whart. on Hom. § 539. Mr. Greenleaf confines it to "the prevention of any atrocious crime attempted to be committed by force; such as murder, robbery, house-breaking in the night-time, rape, mayhem, or any other act of felony against the person" (3 Greenl. Ev. 115); and such seems to be the general expression of the common law text writers. — 1 Russ. Cr. 665–70; 4 Black. Com. 178–80; Whart. Amer. Cr. Law, 298–403; 1 East P. C. 271; 1 Hale, P. C. 488; Foster, 274. It is said by the authors of Cases on Self-Defence that a killing which "appears to be reasonably necessary to prevent a forcible and atrocious felony against property, is justifiable homicide." "This rule," it is added, "the common-law writers do not extend to secret felonies, or felonies not accompanied with force," although no modern case can be found expressly so adjudging. They further add: "It is pretty clear that the right to kill in defence of property does not extend to cases of larceny, which is a crime of a secret character, although the cases which illustrate this exception are generally cases of theft of articles of small value." — Cases on Self-Defence (Horr. & Thomp.), 901–2. This was settled in Reg. *v.* Murphy, 2 Crawf. & Dix C. C. 20, where the defendant was convicted of shooting one detected in feloniously carrying away fallen timber which he had stolen from the premises of the prosecutor, the shooting being done very clearly to prevent the act, which was admitted to be a felony. DOHERTY, C. J., said: "I can not allow it to go abroad that it is lawful to fire upon a person committing a trespass and larceny; for that would be punishing, perhaps with death, offences for which the law has provided milder penalties." This view is supported by the following cases: State *v.* Vance, 17 Iowa, 144; McClelland *v.* Kay, 14 B. Monroe, 106, and others not necessary to be cited. See Cases on Self-Defence, p. 901, *note*.

There is no decision of this court, within our knowledge, which conflicts with these views. It is true the rule has been extended to statutory felonies, as well as felonies at common law, which is doubtless the correct doctrine, but the cases adjudged have been open crimes committed by force, and not those of a secret nature. — Oliver's case, 17 Ala. 587; Carroll's case, 23 Ala. 28; Dill's case, 25 Ala. 15.

In Pond *v.* The People, 8 Mich. 150, after endorsing the rule which we have above stated, it was suggested by CAMPBELL, J., that there might possibly be some "exceptional cases" not within its influence, a proposition from which we are not prepared to dissent. And again in Gray *v.* Combs, 7 J. J. Marsh. 478, 483, it was said by NICHOLAS, J., that the right to kill in order to prevent the perpetration of crime should depend "more upon the character of the crime, and the time and manner of its attempted perpetration, than upon the degree of

punishment attached by law." There is much reason in this view, and a strong case might be presented of one's shooting a felon to prevent the asportation of a stolen horse in the night-time, where no opportunity is afforded to recognize the thief, or obtain speedy redress at law. Both the Roman and Athenian laws made this distinction in favor of preventing the perpetration of theft by night, allowing, in each instance, the thief to be killed when necessary, if taken in the act. — 4 Black. Com. 180, 181.

The alleged larceny in the present case, if it occurred at all, was in the open daylight, and the defendant is not shown to have been unable to obtain his redress at law. Where opportunity is afforded to secure the punishment of the offender by due course of law, the case must be an urgent one which excuses a killing to prevent any felony, much less one not of a forcible or atrocious nature. — Whart. Hom. §§ 536–8. "No man, under the protection of the law," says Sir MICHAEL FOSTER, "is to be the avenger of his own wrongs. If they are of such a nature for which the law of society will give him an adequate remedy, thither he ought to resort." — Foster, 296. It is everywhere settled that the law will not justify a homicide which is perpetrated in resisting a mere civil trespass upon one's premises or property, unaccompanied by force, or felonious intent. — Carroll's case, 23 Ala. 28; Clark's Man. Cr. Law, §§ 355–7; Whart. on Hom. § 540. The reason is that the preservation of human life is of more importance than the protection of property. The law may afford ample indemnity for the loss of the one, while it utterly fails to do so for the other.

The rule we have above declared is the safer one, because it better comports with the public tranquillity and the peace of society. The establishment of any other would lead to disorderly breaches of the peace of an aggravated nature, and therefore tend greatly to cheapen human life. This is especially true in view of our legislative policy which has recently brought many crimes, formerly classed and punished as petit larcenies within the class of statutory felonies. It seems settled that no distinction can be made between statutory and common law felonies, whatever may be the acknowledged extent of the rule. Oliver's case, 17 Ala. 587; Cases on Self-Def. 901, 867; Bish. Stat. Cr. § 139. The stealing of a hog, a sheep, or a goat is, under our statute, a felony, without regard to the pecuniary value of the animal. So would be the larceny of a single ear of corn, which is "a part of any outstanding crop." — Code, § 4358; Acts 1880–81, p. 47. It would be shocking to the good order of government to have it proclaimed, with the sanction of the courts, that one may, in the broad daylight, commit a wilful homicide in order to prevent the larceny of an ear of corn. In our judgment the fifth charge, requested by the defendant, was properly refused.

It cannot be questioned, however, that if there was in truth a larceny of the prisoner's horse, he, or any other private person, had a lawful right to pursue the thief for the purpose of arresting him, and of recap-

turing the stolen property. — Code, §§ 4668–70; 1 Bish. Cr. Proc. §§ 164–5. He is not required, in such case, to inform the party fleeing of his purpose to arrest him, as in ordinary cases. — Code, § 4669. And he could, if resisted, repel force with force, and need not give back, or retreat. If, under such circumstances, the party making resistance is unavoidably killed, the homicide would be justifiable. 2 Bish. Cr. Law, § 647; 1 Russ. Cr. 665; State v. Roane, 2 Dev. 58. If the prisoner's purpose was honestly to make a pursuit, he would not for this reason be chargeable with the imputation of having wrongfully brought on the difficulty; but the law would not permit him to resort to the pretence of pursuit, as a mere colorable device, beneath which to perpetrate crime.

THOMAS v. KINKEAD.

SUPREME COURT OF ARKANSAS. 1892.

[*Reported* 55 *Ark.* 502.]

MANSFIELD, J. This action was brought by the widow and minor children of John Thomas, deceased, against Ewing Kinkead, a constable of Pulaski county, and the sureties on his official bond, to recover damages for the alleged wrongful killing of Thomas by Jesse F. Heard, a deputy of the defendant Kinkead as such constable. Heard was also made a defendant. The complaint avers that the act of killing was committed under color of a warrant for the arrest of Thomas, to answer for a misdemeanor charged against him before a justice of the peace, and that it was done wantonly and without cause.

The defendants by their pleading justify the killing as having been done by Heard in self-defence, while lawfully exercising his power to execute the warrant mentioned in the complaint, and while Thomas was unlawfully resisting arrest and attempting to escape. The appeal is from a judgment rendered on the verdict of a jury against the plaintiffs.

The death of Thomas resulted from a wound inflicted by a pistol-shot, and the evidence as to the immediate circumstances of the homicide was such as to make it questionable whether he had been actually placed under arrest before he was shot. It was contended at the trial that his arrest had been accomplished, and that he was killed while attempting to break away from the custody of the officer. As applicable to this view of the facts, the court, against the objection of the plaintiffs, gave the jury the following instruction: "If the jury find from the evidence that Heard had actually arrested Thomas, whether for felony or misdemeanor, if Thomas attempted to get away, Heard had a right to shoot him, if this shooting was necessary to prevent

his escape; provided Heard acted in the exercise of due caution and prudence."

In repeating substantially the same charge in a different connection, the jury were told that life can be taken to prevent an escape only in case of extreme necessity and when the officer has exhausted all other means of enforcing the prisoner's submission. The duty which the law enjoins upon an officer to exercise his authority with discretion and prudence was also fully and properly stated, and the jury were in effect instructed that the needless killing of a prisoner would in all cases be wrongful. In another part of the charge it was stated, as an admission of the pleadings, that the offence of which Thomas was accused was a misdemeanor. And in other respects the charge of the court was such that the plaintiffs were not prejudiced by the instruction we have quoted, if the life of a prisoner may be taken under any circumstances merely to prevent his escape after arrest for a misdemeanor.

The doctrine of the court's charge is approved by Mr. Bishop, who states it in his work on Criminal Procedure substantially in the language employed by the trial judge. 1 Bishop, Cr. Pro., sec. 161. In his note on the section cited, the author refers to his work on Criminal Law (vol. 2, secs. 647, 650) and to two cases decided by the Supreme Court of Texas — Caldwell *v.* State, 41 Texas, 86, and Wright *v.* State, 44 Texas, 645. In the first of these cases, a prisoner who had been arrested for horse stealing broke away from the custody of the officer, and the latter shot and killed him as he ran in the effort to make his escape. It was held that the officer was rightly convicted of murder in the second degree — the evidence showing that the prisoner was unarmed, and neither attacking nor resisting the officer. The judge who delivered the opinion said: "The law places too high an estimate on a man's life, though he be . . . a prisoner, to permit an officer to kill him while unresisting, simply to prevent an escape." But as the arrest was for a felony, it may be that the decision was controlled by a statute of that State which provides that an "officer executing an order of arrest shall not in any case kill one who attempts to escape, unless in making or attempting such escape, the life of the officer is endangered or he is threatened with great bodily injury." However that may have been, the case gives no support to the text in connection with which it is cited. Nor is such support to be found in the case of Wright *v.* State, where the decision was that the power conferred by a Texas statute upon an officer having the custody of a convicted felon to take the life of the prisoner to prevent his escape does not extend to an officer attempting to re-arrest an escaped convict.

The rule laid down without qualification in "Criminal Procedure" is stated only as "a general proposition" in one of the sections referred to in the work on Criminal Law. From the text of the latter reference is made to the treatise of Russell on Crimes and to the earlier works of Hale and Hawkins. But these writers all appear to limit the application of the rule to cases of felony or to cases where the jailer or other

officer having the custody of a prisoner is assaulted by the latter in his effort to escape and the officer kills him in self-defence. 1 Hale, P. C. 481, 496; 1 Russell on Crimes, 666, 667; 1 Hawkins, P. C. 81, 82. The decisions cited by Mr. Bishop in the section last referred to, as far as we have had the opportunity to examine them, go no further than the authors we have mentioned. U. S. *v.* Jailer, etc., 2 Abb. 265; State *v.* Anderson, 1 Hill, S. B. 327; Regina *v.* Dadson, 14 Jur. 1051. See also 4 Blackstone, 180.

The case of State *v.* Sigman, 106 N. C. 728; S. C. 11 S. E. Rep. 520, is relied upon as sustaining the instruction in question. In that case an officer was indicted for an assault with a deadly weapon, committed by discharging a pistol at a person accused of a misdemeanor, and who had escaped from the officer's custody and was fleeing to avoid re-arrest. The officer being unable to overtake the prisoner fired upon him. He was convicted and the judgment of the trial court was affirmed, the Supreme Court holding that the defendant was guilty of an assault, whether his intention in firing was to hit the escaped prisoner or simply to intimidate him and thereby induce him to surrender. This ruling followed as a conclusion from two propositions stated in the opinion. These are: (1) That an officer who kills a person charged with a misdemeanor and fleeing from him to avoid arrest will at least be guilty of manslaughter. (2) That where a prisoner "has already escaped," no means can be used to re-capture him which would not have been justifiable in making the first arrest; and that if in pursuing him the officer intentionally kills him, it is murder. But the second proposition is preceded by the following paragraph of the opinion upon which the appellees specially rely: "After an accused person has been arrested, an officer is justified to detain him in custody, and he may kill his prisoner to prevent his escape, provided it becomes necessary, whether he be charged with a felony or a misdemeanor." Citing the first volume of Bishop's Criminal Procedure. The view thus expressed does not appear to be consistent with the court's decision. Nor does it seem to be an unqualified approval of the rule as it is stated in Bishop's Criminal Procedure. As stated in the quotation made, it seems to be laid down with reference only to cases where a prisoner resists by force the effort of the officer to prevent him from "breaking away" and is killed in the struggle or affray which follows. In the case then before the court the prisoner had entirely escaped; and having been subsequently found, had run some distance before he was shot at. There was no occasion therefore for deciding whether the shooting, although not in self-defence, would have been justifiable if it had been done in an effort to detain the prisoner in the officer's custody. But we are wholly unable to perceive any ground for a distinction between the latter case and that on which the court's ruling was made. In a paragraph of the opinion preceding that from which we have quoted, in speaking of the case of one who, being charged with a misdemeanor, flees from the officer to avoid arrest, the court said: "The accused is shielded,

. . . even from an attempt to kill, . . . by the merciful rule which forbids the risk of human life or the shedding of blood in order to bring to justice one who is charged with so trivial an offence, when it is probable that he can be arrested another day and held to answer." This humane principle was permitted to prevail against the officer in the case decided, although the person assaulted had been arrested and was shot at in the endeavor made to re-arrest him. Why should it not also protect the life of the prisoner arrested on a similar charge who endeavors forcibly to break away from the officer but offers no violence to the latter endangering his life or exposing his person to great harm?

The case of Head *v.* Martin, 3 S. W. Rep. (Ky.) 622, is also cited by the appellees. But the only ruling there made, as indicated by the syllabus, was that a peace officer, having arrested one accused of a misdemeanor, cannot, when he is fleeing, kill him to prevent his escape; and all that the court says is strongly against the contention of the appellee on the point we are considering. On the point embraced in the quotation of counsel from the opinion, in that case, the jury in the present case were properly charged by instructions other than that now under consideration. The only question presented by the latter is whether an officer having in his custody a prisoner accused of a misdemeanor may take his life if he attempts to break away, where, in the language of the court's charge, "no other means are available" to prevent his escape. A resort to a measure so extreme in cases of misdemeanor was never permitted by the common law. 1 East, P. C. 302. That law has not, it is believed, lost any of its humanity since the time of the writer we have just cited; and no statute of this State operates to restrain its mercy. We have adopted its rule in making arrests in cases of felony. (Carr *v.* The State, 43 Ark. 99.) But without legislative authority the severity of a remote age ought not to be exceeded in dealing with those who are accused of smaller offences.

EAST, in his Pleas of the Crown, after stating the rule that a felon fleeing from justice may be lawfully killed "where he cannot be otherwise overtaken," says: "The same rule holds if a felon after arrest break away as he is carrying to gaol, and his pursuers cannot retake without killing him. But if he may be taken in any case without such severity, it is at least manslaughter in him who kills him." (1 East, P. C. 298.) No distinction, it will be noticed, is made between the case of a felon fleeing from arrest and that of one "breaking away" after arrest; and such is still the law. No reason whatever is given for making such a distinction in cases of misdemeanor, and we have found no adjudged case which in our opinion supports it. See Clements *v.* State, 50 Ala. 117; Head *v.* Martin, 3 S. W. *supra;* Renean *v.* State, 2 Lea, 720.

In United States *v.* Clark, 31 Fed. Rep. 710, Mr. Justice BROWN says: "The general rule is well settled, by elementary writers upon criminal law, that an officer having custody of a person charged with

felony may take his life, if it becomes absolutely necessary to do so to prevent his escape; but he may not do this if he be charged simply with a misdemeanor, the theory of the law being that it is better that a misdemeanant escape than that human life be taken." And he expresses a doubt whether the law permitting life to be taken to prevent an escape is applicable at the present day even to all cases of felony. (See also State *v.* Bryant, 65 N. C. 355); Reneau *v.* State, 2 Lea, *supra.*

It has been said that the officers of the law are "clothed with its sanctity" and "represent its majesty." Head *v.* Martin, 3 S. W. Rep. 623. And the criminal code has provided for the punishment of those who resist or assault them when engaged in the discharge of their duties. Mansf. Dig., secs. 1765–67. But the law-making power itself could not, under the constitution, inflict the death penalty as a punishment for a simple misdemeanor. (Art. 2, sec. 9, const.) And it would ill become the "majesty" of the law to sacrifice a human life to avoid a failure of justice in the case of a petty offender who is often brought into court without arrest and dismissed with a nominal fine. It is admitted that an officer cannot lawfully kill one who merely flees to avoid arrest for a misdemeanor, although it may appear that he can never be taken otherwise. If he runs, then, before the officer has laid his hands upon him with words of arrest, he may do so without danger to his life. But if, by surprise or otherwise, he be for a moment sufficiently restrained to constitute an arrest and then "break away," the officer may kill him if he cannot overtake him. Such is the effect of the argument and of the rule in support of which it is made. We can see no principle of reason or justice on which such a distinction can rest, and we therefore hold that the force or violence which an officer may lawfully use to prevent the escape of a person arrested for a misdemeanor is no greater than such as might have been rightfully employed to effect his arrest. In making the arrest or preventing the escape, the officer may exert such physical force as is necessary on the one hand to effect the arrest by overcoming the resistance he encounters, or on the other to subdue the efforts of the prisoner to escape; but he cannot in either case take the life of the accused, or even inflict upon him a great bodily harm, except to save his own life or to prevent a like harm to himself.

The circuit court erred in so much of its charge as was not in harmony with this statement of the law. In other respects the instructions contain no error prejudicial to the appellant. For the error indicated the judgment will be reversed, and the cause remanded for a new trial.

FOSTER, C. L. 262. Parents, masters, and other persons, having authority *in foro domestico*, may give reasonable correction to those under their care; and if death ensueth without their fault, it will be no more than accidental death. But if the correction exceedeth the bounds of due moderation, either in the measure of it or in the instrument made use of for that purpose, it will be either murder or manslaughter according to the circumstances of the case.[1]

45472

REGINA *v.* GRIFFIN.

LIVERPOOL ASSIZES. 1869.

[*Reported* 11 *Cox C. C.* 402.]

THE prisoner, David Griffin, was indicted for the manslaughter of Ann Griffin, at Liverpool, on the 7th of November, 1869.

The deceased, who was the daughter of the prisoner, was two years and six months old, and her death took place under the following circumstances.

On the 7th of November the prisoner's wife had occasion to leave the house, the deceased, with her brother and sister, being at that time in bed, in a room adjoining that in which the prisoner was sitting. During the absence of his wife, the prisoner heard the deceased crying, and went into the room where the deceased was, and took her out of bed into another room. As he was doing this she committed some childish fault; this made the prisoner angry; and, after having placed her in the other room, he got a strap one inch wide and eighteen inches long and, having turned up her clothes, gave her from six to twelve severe strokes over the lower part of the back and right thigh. Deceased did not cry much at the time, but appeared very frightened; she never recovered from the effects, and died on the following Wednesday, November 10.

Medical evidence was given to the effect that the deceased had been a healthy child and well nourished, and that the cause of death was congestion, accelerated by a shock to the nervous system, produced by the severe beating which the prisoner had given it, the marks of which were clearly seen at the *post mortem* examination on the day following her death.

Hawthorne, for the prisoner, contended that there was no case to go to the jury, for the prisoner had, as a father, a perfect right to correct his child.

Tidswell, for the prosecution, contended that, although a father might correct his child, the law did not permit him to use a weapon

improper for the purpose of correction. He cited Reg. v. Hopley (2 F. & F. 201.)

MARTIN, B. (after having consulted with Willes, J., who concurred in his opinion). The law as to correction has reference only to a child capable of appreciating correction, and not to an infant two years and a half old. Although a slight slap may be lawfully given to an infant by her mother, more violent treatment of an infant so young by her father would not be justifiable; and the only question for the jury to decide is, whether the child's death was accelerated or caused by the blows inflicted by the prisoner.

Guilty.

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CLEARY v. BOOTH.

HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION. 1893.

[*Reported* 1893, 1 *Q. B.* 465.]

LAWRANCE, J. The question in this case is not an easy one; there is no authority, and it is a case of first impression. The question for us is whether the head master of a board school is justified in inflicting corporal punishment upon one of his scholars for an act done outside the limits of the school, and the appellant's counsel has in his argument relied on what might happen if a boy were not punished by the master for such acts. The facts seem to be that a boy while coming to the appellant's school was assaulted by another boy belonging to the same school; that complaint was made to the appellant, who then and there punished the boy who had committed the assault and also the respondent, who was in his company. The first observation that occurs to one to make is that one of the greatest advantages of any punishment is that it should follow quickly on the offence. The cases cited to us show that the schoolmaster is in the position of the parent. What is to become of a boy between his school and his home? Is he not under the authority of his parent or of the schoolmaster? It cannot be doubted that he is; and in my opinion among the powers delegated by the parent to the schoolmaster, such a power as was exercised by the appellant in this case would be freely delegated. If we turn to the Code we find that there are several things for which a grant may be given, including discipline and organization, and that the children are to be brought up in habits of good manners and language, and of consideration for others. Can it be reasonably argued that the only right of a schoolmaster to inflict punishment is in respect of acts done in the school, and that it is only while the boys are there that he is to see that they are well-mannered, but that he has exceeded all the authority delegated to him by the parent if he punishes a boy who within a yard of the school is guilty of gross misbehavior? It is difficult to express

in words the extent of the schoolmaster's authority in respect to the punishment of his pupils; but in my opinion his authority extends, not only to acts done in school, but also to cases where a complaint of acts done out of school, at any rate while going to and from school, is made to the schoolmaster. In the present case I think that weight may properly be placed on the fact that the act for which the boy was punished was done to another pupil of the same school. I think, therefore, that the justices were wrong in convicting the appellant as they did, and that the case must be sent back to them to find as a fact whether the punishment was excessive.

COLLINS, J. I am of the same opinion. It is clear law that a father has the right to inflict reasonable personal chastisement on his son. It is equally the law, and it is in accordance with very ancient practice, that he may delegate this right to the schoolmaster. Such a right has always commended itself to the common sense of mankind. It is clear that the relation of master and pupil carries with it the right of reasonable corporal chastisement. As a matter of common sense, how far is this power delegated by the parent to the schoolmaster? Is it limited to the time during which the boy is within the four walls of the school, or does it extend in any sense beyond that limit? In my opinion the purpose with which the parental authority is delegated to the schoolmaster, who is entrusted with the bringing up and discipline of the child, must to some extent include an authority over the child while he is outside of the four walls. It may be a question of fact in each case whether the conduct of the master in inflicting corporal punishment is right. Very grave consequences would result if it were held that the parent's authority was exclusive up to the door of the school, and that then, and only then, the master's authority commenced; it would be a most anomalous result to hold that in such a case as the present the boy who had been assaulted had no remedy by complaint to his master, who could punish the assailant by a thrashing, but must go before the magistrate to enforce a remedy between them as citizens. Not only would such a position be unworkable in itself, but the Code, which has the force of an Act of Parliament, clearly contemplates that the duties of the master to his pupils are not limited to teaching. A grant may be made for discipline and organization, and it is clear that he is entrusted with the moral training and conduct of his pupils. It cannot be that such a duty or power ceases the moment that the pupil leaves school for home; there is not much opportunity for a boy to exhibit his moral conduct while in school under the eye of the master: the opportunity is while he is at play or outside the school; and if the schoolmaster has no control over the boys in their relation to each other except when they are within the school walls, this object of the Code would be defeated. In such a case as the present, it is obvious that the desired impression is best brought about by a summary and immediate punishment. In my opinion parents do contemplate such an

exercise of authority by the schoolmaster. I should be sorry if I felt myself driven to come to the opposite conclusion, and am glad to be able to say that the principle shows that the authority delegated to the schoolmaster is not limited to the four walls of the school. It is always a question of fact whether the act done was outside the delegated authority; but in the present case I am satisfied, on the facts, that it was obviously within it. The question of excess is one for the magistrates.

FERTICH v. MICHENER.

SUPREME COURT OF INDIANA, 1887.

[*Reported* 111 *Ind.* 472.]

NIBLACK, J. This was an action by Nora S. Michener, a minor child, acting through Louis T. Michener, her father and next friend, against William H. Fertich for alleged injuries received while attending a public school of which Fertich was the superintendent.

The complaint was in three paragraphs. . . . The second paragraph charged the defendant with having, on the 15th day of January, 1885, wrongfully and unlawfully restrained the plaintiff of her liberty for a period of thirty minutes.[1]

The court also instructed the jury to the effect that if the appellee was at any time detained in the school-room for a period of ten or fifteen minutes after her class was dismissed, as a penalty for having asked leave to retire and having retired from the room during school hours, such detention was a false imprisonment, and that a teacher who might refuse to permit a pupil to retire from the school-room, in accordance with the rule set out in the third paragraph of the complaint, would be liable for whatever damages thereby resulted to the pupil.

In our view of the principles underlying this case, that instruction was also erroneous. Such a detention after the rest of the class was dismissed may have been unjust, in the particular instance, as well as in a general sense, to the appellee, and it, as well as the refusal of permission to retire, may have been a violation of the spirit of the rule referred to; but, upon the hypothesis stated in the instruction, the detention did not amount to a false imprisonment, and the refusal of permission to retire did not constitute a cause of action against the teacher.

The recognized doctrine now is, that a school officer is not personally liable for a mere mistake of judgment in the government of his school.

[1] Only so much of the case as deals with this paragraph of the complaint is here printed. — ED.

To make him so liable it must be shown that he acted in the matter complained of wantonly, wilfully, or maliciously. Cooper *v.* McJunkin, 4 Ind. 290; Gardner *v.* State, 4 Ind. 632; Danenhoffer *v.* State, 79 Ind. 75; Elmore *v.* Overton, 104 Ind. 458 (54 Am. R. 343); Churchill *v.* Fewkes, 13 Bradw. 520; McCormick *v.* Burt, 95 Ill. 263 (35 Am. R. 163); Harman *v.* Tappenden, 1 East, 555; Dritt *v.* Snodgrass, 66 Mo. 286 (27 Am. R. 343).

The instruction consequently fell short of telling the jury all that was necessary to establish a liability for either the detention or the refusal referred to by it.

The detention or keeping in of pupils for a short time after the rest of the class has been dismissed, or the school has closed, as a penalty for some misconduct, shortcoming, or mere omission, has been very generally adopted by the schools, especially those of the lower grade, and it is now one of the recognized methods of enforcing discipline and promoting the progress of the pupils in the common schools of the State. It is a mild and non-aggressive method of imposing a penalty, and inflicts no disgrace upon the pupil. The additional time thus spent in studying his lessons presumably inures to the benefit of the pupil. However mistaken a teacher may be as to the justice or propriety of imposing such a penalty at any particular time, it has none of the elements of false imprisonment about it, unless imposed from wanton, wilful, or malicious motives. In the absence of such motives, such a mistake amounts only to an error of judgment in an attempt to enforce discipline in the school, for which, as has been stated, an action will not lie. And in this connection it is perhaps proper to say that there is nothing in the evidence, as we construe it, tending to show that the appellee's teacher was actuated by wantonness, wilfulness, or malice in any of the alleged wrongs of which the appellee has complained. As there was a failure of proof as against the teacher, the necessary inference is that the evidence was insufficient to establish a cause of action against the appellant. As to what constitutes a reasonable rule for the government of a school, see the case of Burdick *v.* Babcock, 31 Iowa, 562, above cited.

The judgment is reversed, with costs.

45-8782

HERITAGE *v.* DODGE.

SUPREME COURT OF NEW HAMPSHIRE, 1886.

[*Reported* 64 *N. H.* 297.]

TRESPASS, for assault and battery. Plea, the general issue, with a brief statement that the defendant was teacher of a public school in which the plaintiff was a scholar, and that the assault and battery com-

plained of was the infliction of reasonable punishment of the plaintiff for disrespectful conduct and violation of the regulations of the school. The evidence tended to show that some of the scholars had a practice of coughing and making noises resembling coughing for the purpose of attracting attention, which disturbed the order and quiet of the school. The defendant requested that the noises be stopped, but the disturbance continued to some extent. At the time of the assault the defendant was repeating the request to the school, when the plaintiff made a noise resembling a cough, which the defendant understood was intended by the plaintiff as an act of contempt and defiance of the teacher's authority, and thereupon the defendant inflicted the punishment complained of.

The plaintiff offered evidence tending to show that a portion of the scholars, including the plaintiff, were affected with a cough known as chin-cough or whooping-cough, and the plaintiff testified that the coughing for which he was punished was involuntary, and not intended as an act of disobedience or of defiance. The plaintiff requested the following instruction: "If the jury find that the plaintiff could not help coughing by reason of a chin-cough, then the defendant was not justified in punishing the plaintiff, although the defendant believed that the plaintiff coughed for the purpose of defying his authority and disobeying the rules of the school." The court declined to give this instruction, and the plaintiff excepted.

Upon this point the court charged the jury that if the defendant, acting honestly and with reasonable caution and prudence, believed that the act of the plaintiff was intended as an act of disrespect for and contempt of the teacher's authority, and if he had reasonable cause for believing that the noise made by the plaintiff was intentional and for the purpose of showing his defiance of the reasonable requirements of the defendant in the government of the school, then the defendant was justified in inflicting moderate and reasonable punishment upon the plaintiff.

The plaintiff excepted to the foregoing instructions. Verdict for the defendant.

SMITH, J. The instructions requested made the defendant liable, without regard to the fact whether he exercised reasonable judgment and discretion in determining whether the plaintiff was guilty of intentional misconduct as a scholar. The law clothes the teacher, as it does the parent in whose place he stands, with power to enforce discipline by the imposition of reasonable corporal punishment. 1 Blk. Com. 453; 2 Kent Com. 205; Reeve Dom. Rel. 288, 289, 375. He is not required to be infallible in his judgment. He is the judge to determine when and to what extent correction is necessary; and like all others clothed with a discretion, he cannot be made personally responsible for error in judgment when he has acted in good faith and without malice. Cooley Const. Lim. 341; Cooley Torts, 171, 172, 288; Lander

v. Seaver, 32 Vt. 114; State v. Pendergrass, 2 Dev. & Bat. 365; Fitzgerald v. Northcote, 4 F. & F. 565; Reeve Dom. Rel. 288.

The instructions were correct, and there was no error in the refusal to give those requested.[1]

Exceptions overruled.

CLARK, J., did not sit: the others concurred.

460442

COMMONWEALTH v. MCAFEE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1871.

[*Reported* 108 *Mass.* 458.]

INDICTMENT of Hugh McAfee, charging him with the manslaughter of Margaret McAfee, his wife, in that he, "the said Margaret did feloniously and wilfully strike, kick, beat, bruise, and wound, in and upon the head and body of her, the said Margaret, and her, the said Margaret, did throw upon the floor, thereby by the said striking, kicking, beating, wounding, and throwing upon the floor, then and there giving to the said Margaret divers and many mortal strokes," etc., of which said mortal strokes, etc., the said Margaret then and there died.

It appeared at the trial that the defendant's wife was drunk; that he struck her with his open hand, one blow on the cheek and one upon the temple; and that she fell upon the floor and did not speak afterward. Medical witnesses testified, "that she had, by falling on a chair most probably, or by some other external force, been affected by concussion of the brain and effusion of blood on the brain, and that thus her death was occasioned."

The defendant requested the judge to instruct the jury that the husband had a legal right to administer due and proper correction and corporal chastisement on his wife.[2]

The judge refused so to instruct the jury, and gave them the following instructions: "Upon any view of the facts in this case, which the testimony, taken most strongly for the defendant, will allow, there was, as matter of law, no justification for the blows given by the defendant to the deceased. If the unlawful blows of the defendant caused death, either directly, or by causing the deceased to fall upon the floor by the force and effect thereof, and so death thereby ensued, then the defendant is guilty of manslaughter." The jury returned a verdict of guilty, and the defendant alleged exceptions.

CHAPMAN, C. J. . . . The beating of the defendant's wife was unlawful. In Pearman v. Pearman, 1 Swab. & Tristr. 601, it is said that

[1] See also Boyd v. State, 88 Ala. 169; Donnelley v. Terr (Ari.), 52 Pac. 368; Sheehan v. Sturges, 53 Conn. 481; Hinkle v. State, 127 Ind. 490, 26 N. E. 777; State v. Mizner, 45 Ia. 248; State v. Long, 117 N. C. 791, 23 S. E. 431. — ED.

[2] Only so much of the case as discusses this request is given. — ED.

there is no law authorizing a man to beat his drunken wife. Beating a wife is held to be unlawful in New York. People *v.* Winters, 2 Parker's Crim. Cas. 10; Perry *v.* Perry, 2 Paige, 501, 503. There is no authority in its favor in this commonwealth. Beating or striking a wife violently with the open hand is not one of the rights conferred on a husband by the marriage, even if the wife be drunk or insolent. The blows being illegal, the defendant was at least guilty of manslaughter. Commonwealth *v.* Fox, 7 Gray, 585.

Exceptions overruled.

THE QUEEN *v.* JACKSON.

COURT OF APPEAL, 1891.

[*Reported* (1891) 1 *Q. B.* 671.]

ARGUMENT on the return to a writ of *habeas corpus*, commanding Edmund Haughton Jackson to bring up the body of Emily Emma Maude Jackson, his wife, taken and detained in his custody.

LORD ESHER, M. R.[1] In this case it is really admitted that this lady is confined by the husband physically so as to take away her liberty. The only question for us to determine is whether in this case we can allow that to continue. The husband declares his intention to continue it. He justifies such detention; and the proposition laid down on his behalf is that a husband has a right to take the person of his wife by force and keep her in confinement, in order to prevent her from absenting herself from him so as to deprive him of her society. A series of propositions have been quoted which, if true, make an English wife the slave, the abject slave, of her husband. One proposition that has been referred to is that a husband has a right to beat his wife. I do not believe this ever was the law. Then it was said that, if the wife was extravagant, the husband might confine her, though he could not imprison her. The confinement there spoken of was clearly the deprivation of her liberty to go where she pleases. The counsel for the husband was obliged to admit that, if she was kept to one room, that would be imprisonment; but he argued that, if she was only kept in the house, that was confinement only. That is a refinement too great for my intellect. I should say that confining a person to one house was imprisonment, just as much as confining such person to one room. I do not believe that this contention is the law or ever was. It was said that by the law of England the husband has the custody of his wife. What must be meant by "custody" in that proposition so used to us? It must mean the same sort of custody as a gaoler has of a prisoner. I

[1] The return to the writs and the concurring opinions of LORD HALSBURY, L. C., and FRY, L. J., are omitted. — ED.

protest that there is no such law in England. Cochrane's Case, 8 Dowl. 630, was cited as deciding that the husband has a right to the custody, such custody, of his wife. I have read it carefully, and I think that it does so decide. The judgment, if I may respectfully say so, is not very exactly worded, and uses different expressions in many places where it means the same thing; but that seems to me to be the result of it. It appears to me, if I am right in attributing to it the meaning I have mentioned, that the decision in that case was wrong as to the law enunciated in it, and that it ought to be overruled. Sitting here, in the Court of Appeal, we are entitled to overrule it. I do not believe that an English husband has by law any such rights over his wife's person, as have been suggested. I do not say that there may not be occasions on which he would have a right of restraint, though not of imprisonment. For instance, if a wife were about immediately to do something which would be to the dishonour of her husband, as if the husband saw his wife in the act of going to meet a paramour, I think that he might seize her and pull her back. That is not the right that is contended for in this case. The right really now contended for is that he may imprison his wife by way of punishment, or if he thinks that she is going to absent herself from him, for any purpose, however innocent of moral offense, he may imprison her, and it must go the full length that he may perpetually imprison her. I do not think that this is the law of England. But, assuming that there is such a right, the question arises whether the way in which and the circumstances under which it has been exercised in this case are such that the law ought to give back to the husband the custody of this lady against her will. The seizure was made on a Sunday afternoon when she was coming out of church, in the face of the whole congregation. He takes with him to assist him in making the seizure a young lawyer's clerk and another man. The wife is taken by the shoulders and dragged into a carriage, and falls on the floor of the carriage with her legs hanging out of the door. These have to be lifted in by, I believe, the clerk. Her arm is bruised in the struggle. She is then driven off to the husband's house, the lawyer's clerk riding in the carriage with them. Could anything be more insulting? The lawyer's clerk remains at the house, and a nurse is engaged to attend to the wife, who is not ill. Obviously the lawyer's clerk and the nurse are to help to keep watch over her and control her. That in itself is insulting. She goes to a window in the house, and, one of her relations being outside, the blind is immediately pulled down. I think that the circumstances of this seizure and detention were those of extreme insult, and I cannot think that it can be that under such circumstances as these the husband has a right to keep his wife insultingly imprisoned till she undertakes to consort with him. In my opinion, the circumstances are such that the court ought not to give her back into his custody. He has obtained, it is true, a decree for restitution of conjugal rights; but that gives him no power to take the law into his own

hands and himself enforce the decree of the court by imprisonment. Formerly that decree might have been enforced by attachment for contempt; but that would have been an imprisonment by the court, not by the husband. The power of attachment in such cases is now taken away. The suggestion, therefore, must be that, though the court has no power to force the wife to restore conjugal rights by imprisonment, the husband himself has a right to take her by force and imprison her without the assistance of the court. I think that the passing of the Act of Parliament which took away the power of attachment in such cases is the strongest possible evidence to show that the legislature had no idea that a power would remain in the husband to imprison the wife for himself; and this tends to show that it is not and never was the law of England that the husband has such a right of seizing and imprisoning the wife as contended for in this case. If there is now a greater difficulty than there was in enforcing, or if it is now impossible effectively to enforce a decree for the restitution of conjugal rights, the legislature has caused this by Act of Parliament, and the legislature must deal with the matter. For these reasons I agree that the return to the writ is bad, and that the husband has so acted that we ought not to give back the custody of this lady to him.

Return held bad, and wife to go free.

TINKLE *v.* DUNIVANT.

463 F.2

SUPREME COURT OF TENNESSEE, 1886.

[*Reported* 16 *Lea*, 503.]

FREEMAN, J. This is a suit for recovery of damages for an alleged assault and battery by Tinkle on the plaintiff. The jury found a verdict in favor of plaintiff and assessed her damages at $500, from the judgment on which there is an appeal in error to this court.

Several errors are assigned, which we proceed to dispose of. First, it is said, the damages are excessive. While they are probably large for the actual amount of injury, we cannot say they are so large as to evidence passion or prejudice on the part of the jury. The proof on the part of the plaintiff, which is evidently credited by the jury, is substantially, that plaintiff, a girl of about eighteen years of age, lived in defendant's house as a "house servant of all work," kept probably to assist Mrs. Tinkle in her general household duties. It seems there was an infant child of a few months old in the family which required to be fed by means of milk drawn from a bottle, the mother not being able to give it nourishment from the breast. The child seems to have been fretful and required the bottle of milk during the night of the trouble, when Tinkle went into the room adjoining the family room and called plaintiff to get up and come into the other room. It is probable she failed to do so, as he says, after being called more than once; she claims

that she had not heard the calls. The child continuing to cry, defendant took an oil lamp in his left hand, went into the room where plaintiff was in bed with a niece of his, and seized her by the arm, pulled her from the bed on the floor, and as he admits, "tapped" her on her side with his foot. She insists he kicked her with considerable severity, and the weight of the evidence tends to support her view of the facts. It is shown that the act was of such a character that the niece of defendant raised up in the bed and said to him to stop. The plaintiff says she was hurt in her side and had felt pain as the result at times up to the trial. She was also somewhat bruised on her arm by the pressure of the hand in pulling her out of bed; she was in her night dress, and her gown is shown to have been torn. While there has been no serious permanent damage, we cannot say the jury erred in believing the plaintiff's theory of the case, and so believing, the damage cannot be held, as we have said, to be so excessive as to require us to reverse for this cause. . . . His Honor was requested to charge the jury, "that if plaintiff was a minor under the age of twenty-one years, and was in the employ of defendant as a servant, he would have the right to require her to obey his reasonable commands, and in case of disobedience, to use moderate force to compel her to do so." To this he replied, "this request is the law, but defendant would not have the right to pull her out of bed and kick her." In this he erred against the plaintiff, so far as the first part of the proposition goes. A master has no right to enforce his commands upon his servant or employee by the use of force or personal chastisement. We so held in the case of Cooper *v.* The State, 8 Bax. 325. "A master has the right to use moderate corporeal correction in case of an offending apprentice." Commond *v.* Baird, 1 Ask. Pa. Rep. 267. But this right is denied as respects ordinary hired servants. 2 Kent's Com. 261. The only civil remedies a master has for idleness, disobedience, or other dereliction of duty, or breach of contract on the part of a servant, are either to bring an action against him or discharge him from service. Wait's Act. and Def., vol. 4, page 600, and authorities cited.[1]

THE KING'S PREROGATIVE IN SALTPETRE.

ALL THE JUDGES OF ENGLAND. 464 Ltl

Reported 12 *Co.* 12.

ALL the Justices, viz., Popham, Chief Justice of England, Coke, Chief Justice of the Common Pleas, Fleming, Chief Baron, Fenner, Searl, Yelverton, Williams, and Tanfield, JJ., were assembled at Serjeants-Inn, to consult what prerogative the King had in digging and taking of saltpetre to make gunpowder by the law of the realm; and, upon conference between them, these points were resolved by them all, *una voce*.

[1] Part of the opinion is omitted. — ED.

That although the invention of gunpowder was devised within time of memory, viz., in the time of R. 2., yet inasmuch as this concerns the necessary defense of the realm, he shall not be driven to buy it in foreign parts; and foreign princes may restrain it at their pleasure, in their own dominions: and so the realm shall not have sufficient for the defense of it, to the peril and hazard of it: and therefore insomuch as saltpetre is within the realm, the King may take it according to the limitations following for the necessary defense of the kingdom.

Although the King cannot take the trees of the subject growing upon his freehold and inheritance, as it was now lately resolved by us the Justices of England: and although he cannot take gravel in the inheritance of the subject, for reparation of his houses, as the book is in 11 H. 4. 28; yet it was resolved, that he may dig for saltpetre, for this that the ministers of the King who dig for saltpetre are bound to leave the inheritance of the subject in so good plight as they found it, which they cannot do if they might cut the timber growing, which would tend to the disinheritance of the subject, which the King by prerogative cannot do; for the King (as it is said in our books) cannot do any wrong.

And as to the case of gravel, for reparation of the houses of the King, it is not to be compared to this case; for the case of saltpetre extends to the defense of the whole realm, in which every subject hath benefit; but so it is not in the case of the reparation of the King's houses: and therefore it is agreed in 13 H. 4. and other books, that the King may charge the subject for murage of a town, to which the subjects were charged in the time of insurrection or war, for safety: and so for pontage, for this that he which is charged hath benefit by it. But the King cannot charge the subject for the making of a wall about his own house, or for to make a bridge to come to his house; for that doth not extend to public benefit: but when enemies come against the realm to the sea-coast, it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defense of the realm, for every subject hath benefit by it. And therefore by the common law, every man may come upon my land for the defense of the realm, as appears 9 Ed. 4. 23. And in such case on such extremity they may dig for gravel, for the making of bulwarks; for this is for the public, and every one hath benefit by it; but after the danger is over, the trenches and bulwarks ought to be removed, so that the owner shall not have prejudice in his inheritance: and for the commonwealth, a man shall suffer damage; as, for saving of a city or town, a house shall be plucked down if the next be on fire: and the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action, as it is said in 3 H. 8 fol. 15. And in this case the rule is true, *Princeps et respublica ex justa causa possunt rem meam auferre.*[1]

[1] See also Y. B. 9 Ed. 4, 23, pl. 41, Ames Cas. Torts (3d ed.) 177. — Ed.

4667 42

STATE v. WRAY.

SUPREME COURT OF NORTH CAROLINA. 1875.

[*Reported* 72 *North Carolina*, 253.]

SETTLE, J. The defendants being indicted for retailing spirituous liquors without a license so to do, the jury rendered the following special verdict: "The defendants were druggists and partners in the town of Shelby, and kept medicines for sale, but had no license to retail spirituous liquors. In the month of July, 1872, Dr. O. P. Gardner, a practising physician in the town of Shelby, prescribed the use of a half-pint of French brandy for Mrs. Durham, the wife of the witness, Hill Durham, and directed the witness to go to the defendants for it. That Dr. Gardner also went to the defendants and directed them to let the witness have the said brandy for his wife as medicine. The witness then went to the defendants and purchased the half-pint of French brandy, and his wife used it as medicine. That French brandy is a spirituous liquor; that it is also an essential medicine, frequently prescribed by physicians, and often used, and that in this case it was bought in good faith as a medicine, and was used as such."

The letter of the law has been broken, but has the spirit of the law been violated? The question here presented has been much discussed, but it has not received the same judicial determination in all the States in which it has arisen. In this conflict of authority we shall remember that the reason of the law is the life of the law, and when one stops the other should also stop.

What was the evil sought to be remedied by our statute? Evidently the abusive use of spirituous liquors, keeping in view at the same time the revenues of the State. The special verdict is very minute in its details, and makes as strong a case for the defendants as perhaps will ever find its way into court again. A physician prescribes the brandy as a medicine for a sick lady, and directs her husband to get it from the defendants, who are druggists. It may be that a pure article of brandy, such as the physician was willing to administer as a medicine, was not to be obtained elsewhere than at the defendants' drugstore. The doctor himself goes to the defendants and directs them to let the witness have the brandy as a medicine for his wife. And the further fact is found, which perhaps might have been assumed without the finding, that French brandy is an essential medicine, frequently prescribed by physicians and often used; and the farther and very important fact is established, that in this case it was bought in good faith as a medicine, and was used as such. After this verdict we cannot doubt that the defendants acted in good faith and with due caution, in the sale which is alleged to be a violation of law.

In favor of defendants, criminal statutes are both contracted and

expanded. 1 Bishop, par. 261. Now unless this sale comes within the mischief which the statute was intended to suppress, the defendants are not guilty; for it is a principle of the common law that no one shall suffer criminally for an act in which his mind does not concur. The familiar instance given by Blackstone illustrates our case better than I can do by argument. The Bolognian law enacted "that whosoever drew blood in the street, should be punished with the utmost severity." A person fell down in the street with a fit, and a surgeon opened a vein and drew blood in the street. Here was a clear violation of the letter of the law, and yet from that day to this, it has never been considered a violation of the spirit of the law. Perhaps it will give us a clearer view of the case if we put the druggist out of the question, and suppose that the physician himself, in the exercise of his professional skill and judgment, had furnished the liquor in good faith as a medicine. Can it be pretended that he would be any more guilty of a violation of our statute, than the surgeon was guilty of a violation of the Bolognian law? We think not.

But we would not have it understood that physicians and druggists are to be protected in an abuse of the privilege. They are not only prohibited from selling liquor in the ordinary course of business, but also from administering it as a medicine unless it be done in good faith, and after the exercise of due caution as to its necessity as a medicine. The sale of liquor without a license, in quantities less than a quart, is *prima facie* unlawful, and it is incumbent upon one who does so sell to show that it was done under circumstances which render it lawful. In this case we think such circumstances have been shown, and we concur in the judgment of his honor, that the defendants are not guilty.

PER CURIAM. *Judgment affirmed.*

PEOPLE v. TAYLOR.

SUPREME COURT OF MICHIGAN, 1896.

[*Reported* 110 *Mich.* 491.]

MONTGOMERY, J. The respondent was convicted of keeping a saloon open on Sunday.[1] . . . The defendant offered testimony that on the Sunday in question he and his father-in-law were walking along the street, and came to nearly in front of his saloon, when they met four men; that defendant's father-in-law was taken suddenly ill, and it was suggested that he be taken home in a carriage, but he replied that he must have a doctor right away; that defendant then opened his saloon, admitted his father-in-law and the four other men, and tele-

[1] Part of the opinion only is given. — ED.

phoned for a doctor. The defendant's own testimony shows that he was unable to state whether there were other persons admitted into the saloon. . . .

We think this testimony fails to show any overruling necessity for opening up the saloon and admitting people indiscriminately. If it was necessary to take his father to a place for treatment, there was a drug store within a few feet of the place, lawfully open. Or, even if it might be said that it was proper to open the saloon for this purpose, it was not necessary to let in a battalion of customers at the same time. The facts were not disputed except as to the number of people admitted. No error was committed to the prejudice of respondent, and the conviction will be affirmed.

GLEVER *v.* HYNDE. 46 872

COMMON BENCH, 1674.

[*Reported* 1 *Mod.* 168.]

GLEVER brought an action of trespass, of assault and battery, against Elizabeth Hynde and six others, For that they at York-Castle, in the county of York, him, the said plaintiff, with force and arms did assault, beat, and evil-entreat, to his damage of one hundred pounds.

The defendants plead to the *vi et armis*, not guilty; to the assault, beating, and evil-entreating, they say, that at such a place, in the county of Lancaster, one Jackson, a curate, was performing the rites and funeral obsequies, according to the usage of the church of England, over the body of ——, there lying dead, and ready to be buried; and that then and there the plaintiff did maliciously disturb him; that they, the defendants, required him to desist; and because he would not, that they to remove him, and for the preventing of further disturbance, *molliter ei manus imposuerunt, &c. quæ est eadem transgressio; absque hoc* that they were guilty of any assault, etc. within the county of York, or any where else *extra comitatum Lancastriæ*. — The plaintiff demurs.

THE COURT. The statute of 1. Philip & Mary concerns preachers only: but there is another act, made 1. Eliz. c. 2. s. 9. that extends to all men in orders that perform any part of the public service. But neither of these statutes take away the common law. And at the common law, any person there present might have [1] removed the plaintiff; for they were all concerned in the service of God that was then performing; so that the plaintiff in disturbing it, was a nuisance to them all; and might be removed by the same rule of law that allows a man to abate a nuisance. — Whereupon judgment was given for the defendant, *nisi causa, &c.*[2]

[1] See 6. Edw. 6, c. 4. the 1. Mary, c. 3. and the 1. Will. & Mary, c. 18. s. 19.

[2] See also Cooper *v.* McKenna, 124 Mass. 284. — ED.

PUTNAM *v.* PAYNE.

SUPREME COURT, NEW YORK, 1816.

[*Reported* 13 *Johns.* 312.]

IN error, on *certiorari* to a justice's court.

The defendant in error brought an action, in the court below, against the plaintiff in error, for killing his dog. It was proved, at the trial, that the dog was very vicious, and frequently attacked persons passing in the street, in Lansingburgh, where the parties resided. The plaintiff below had frequently been notified of the ferocious acts of his dog, and had been requested by the neighbors to kill or confine him. The dog in question had been bitten, a few days before he was killed, by a mad dog. There being a very great alarm in the village of Lansingburgh, on account of mad dogs, the inhabitants petitioned the trustees to pass by-laws for restraining dogs, and killing those that should be found at large; and the trustees accordingly passed a law, declaring it lawful for any person to kill any dog which should be found at large in the village. It was also proved that the plaintiff below called upon the defendant, and informed him, that a certain other dog in the village was mad, and requested him to go and shoot it; that the defendant accordingly took his gun for that purpose, and in passing through the village met the plaintiff's dog running loose, and shot him dead. Judgment was given for the plaintiff below.

Per Curiam. It is unnecessary, in this case, to decide whether the act complained of could be justified under the by-law of the corporation.

The defendant was fully justified in killing the dog, under the circumstances of the case, upon common law principles. The dog was, generally, a dangerous and unruly animal, and his owner knew it; yet he permitted him to run at large, or kept him so negligently, that he escaped from his confinement. Such negligence was wanton and cruel, and fully justified the defendant in killing the dog as a nuisance. The public safety demands this rule. It is little better than mockery to say that a person injured by such an animal might sue for damages, or for penalties.

But, in addition to this, the dog had lately been bitten by a mad dog; this, in itself, was sufficient to justify any person in killing him, if found running at large. We do not mean to say that this would be allowed as a justification in killing more useful, and less dangerous, animals, as hogs, etc.

Judgment reversed.

4707h2

SUROCCO v. GEARY.

SUPREME COURT OF CALIFORNIA, 1853.

[*Reported* 3 *Cal.* 69.]

MURRAY, C. J., delivered the opinion of the court. HEYDENFELDT, J., concurred.

This was an action, commenced in the court below, to recover damages for blowing up and destroying the plaintiffs' house and property, during the fire of the 24th of December, 1849.

Geary, at that time Alcade of San Francisco, justified, on the ground that he had authority, by virtue of his office, to destroy said building, and also that it had been blown up by him to stop the progress of the conflagration then raging.

It was in proof, that the fire passed over and burned beyond the building of the plaintiffs', and that at the time said building was destroyed, they were engaged in removing their property, and could, had they not been prevented, have succeeded in removing more, if not all of their goods.

The cause was tried by the court sitting as a jury, and a verdict rendered for the plaintiffs, from which the defendant prosecutes this appeal under the Practice Act of 1850.

The only question for our consideration is, whether the person who tears down or destroys the house of another, in good faith, and under apparent necessity, during the time of a conflagration, for the purpose of saving the buildings adjacent, and stopping its progress, can be held personally liable in an action by the owner of the property destroyed.

This point has been so well settled in the courts of New York and New Jersey, that a reference to those authorities is all that is necessary to determine the present case.

The right to destroy property, to prevent the spread of a conflagration, has been traced to the highest law of necessity, and the natural rights of man, independent of society or civil government. "It is referred by moralists and jurists to the same great principle which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard goods in a tempest, for the safety of a vessel; with the trespassing upon the lands of another, to escape death by an enemy. It rests upon the maxim, *Necessitas inducit privilegium, quod jura privata.*"

The common law adopts the principles of the natural law, and places the justification of an act otherwise tortious precisely on the same ground of necessity. (See 1st Zabriskie, American Print Works *v.* Lawrence, and the cases there cited.)

This principle has been familiarly recognized by the books from the

time of the saltpetre case, and the instances of tearing down houses to prevent a conflagration, or to raise bulwarks for the defense of a city, are made use of as illustrations, rather than as abstract cases, in which its exercise is permitted. At such times, the individual rights of property give way to the higher laws of impending necessity.

A house on fire, or those in its immediate vicinity, which serve to communicate the flames, becomes a nuisance, which it is lawful to abate, and the private rights of the individual yield to the considerations of general convenience, and the interests of society. Were it otherwise, one stubborn person might involve a whole city in ruin, by refusing to allow the destruction of a building which would cut off the flames and check the progress of the fire, and that, too, when it was perfectly evident that his building must be consumed.

The respondent has invoked the aid of the constitutional provision which prohibits the taking of private property for public use, without just compensation being made therefor. This is not "a taking of private property for public use," within the meaning of the Constitution.

The right of taking individual property for public purposes belongs to the State, by virtue of her right of eminent domain, and is said to be justified on the ground of state necessity; but this is not a taking or a destruction for a public purpose, but a destruction for the benefit of the individual or the city, but not properly of the State.

The counsel for the respondent has asked, who is to judge of the necessity of the destruction of property?

This must, in some instances, be a difficult matter to determine. The necessity of blowing up a house may not exist, or be as apparent to the owner, whose judgment is clouded by interest, and the hope of saving his property, as to others. In all such cases the conduct of the individual must be regulated by his own judgment as to the exigencies of the case. If a building should be torn down without apparent or actual necessity, the parties concerned would undoubtedly be liable in an action of trespass. But in every case the necessity must be clearly shown. It is true, many cases of hardship may grow out of this rule, and property may often in such cases be destroyed, without necessity, by irresponsible persons, but this difficulty would not be obviated by making the parties responsible in every case, whether the necessity existed or not.

The legislature of the State possess the power to regulate this subject by providing the manner in which buildings may be destroyed, and the mode in which compensation shall be made; and it is to be hoped that something will be done to obviate the difficulty, and prevent the happening of such events as those supposed by the respondent's counsel.

In the absence of any legislation on the subject, we are compelled to fall back upon the rules of the common law.

The evidence in this case clearly establishes the fact, that the blowing up of the house was necessary, as it would have been consumed had it been left standing. The plaintiffs cannot recover for the value of the goods which they might have saved; they were as much subject to the necessities of the occasion as the house in which they were situate; and if in such cases a party was held liable, it would too frequently happen, that the delay caused by the removal of the goods would render the destruction of the house useless.

The court below clearly erred as to the law applicable to the facts of this case. The testimony will not warrant a verdict against the defendant.[1]

Judgment reversed.

47 272

PROCTOR *v.* ADAMS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1873.

[*Reported* 113 *Mass.* 376.]

TORT, in the nature of trespass *quare clausum*, for entering the plaintiff's close and carrying away a boat.

At the trial in the Superior Court, before *Brigham*, C. J., it appeared that the premises described in the declaration were a sandy beach on the sea side of Plum Island, and that the defendants went there, between high and low water mark, January 19, 1873, and against the objection and remonstrances of the plaintiff's tenant, carried away a boat worth $50, which they found lying there.

The defendants offered evidence that upon the night of January 18, 1873, there was a severe storm; that the next morning they went upon the beach to see if any vessels or property had been cast ashore; that they found a boat lying upon the beach about twenty-five feet below high water mark, which had apparently been driven ashore in the storm; that in order to save it, they endeavored to haul it upon the beach, and succeeded in putting it near the line of high water mark; that, not thinking it secure, they, the next day, pushed it into the water, and carried it around into Plum Island River, on the inside of the island; that they at once advertised it in the Ipswich and Newburyport papers; that they shortly afterwards delivered it to one Jackman, who claimed it as agent for the underwriters of the wrecked steamer Sir Francis, and who paid them twelve dollars for their services and expenses.

The court ruled that these facts, if proved, would not constitute a defense, and proposed to instruct the jury as follows:

"If the land upon which the boat was found and taken possession of

[1] See also Dewey *v.* White, M. & M. 56; Drake *v.* Shorter, 4 Esp. 165. — ED.

by the defendants was in the possession or occupation of the plaintiff, the defendants' entry upon it without permission of the plaintiff was an unlawful entry.

"If the defendants, having made an unlawful entry upon the plaintiff's land, there took and therefrom carried a boat, for any purpose affecting the boat as derelict or wrecked property, they are liable to the plaintiff for their unlawful entry upon the land in nominal damage, and also, the boat not being their property, but a wreck, in damages for the unlawful taking and carrying away of the boat, to the value of the boat."

The defendants requested the court to rule that, upon the case presented, the law would imply a license, but the court declined so to rule. The defendants then declined to go to the jury, and the court instructed the jury to return a verdict for the plaintiff for $51, and reported the case to this court.

GRAY, C. J. The boat, having been cast ashore by the sea, was a wreck, in the strictest legal sense. 3. Bl. Com., 106. Chase *v.* Corcoran, 106 Mass. 286, 288. Neither the finders of the boat, nor the owner of the beach, nor the Commonwealth, had any title to the boat as against its former owner. Body of Liberties, art. 90. Anc. Chart., 211. 2 Mass. Col. Rec., 143. St. 1814, c. 170. Rev. Sts. c. 57. Gen. Sts. c. 81. 3 Dane Ab., 134, 136, 138, 144. 2 Kent Com., 322, 359. But the owner of the land on which the boat was cast was under no duty to save it for him. Sutton *v.* Buck, 2 Taunt., 302, 312.

If the boat, being upon land between high and low water mark, owned or occupied by the plaintiff, was taken by the defendants, claiming it as their own, when it was not, the plaintiff had a sufficient right of possession to maintain an action against them. Barker *v.* Bates, 13 Pick. 255. Dunwich *v.* Sterry, 1 B. & Ad. 831. But if, as the evidence offered by them tended to show, the boat was in danger of being carried off by the sea, and they, before the plaintiff had taken possession of it, removed it for the purpose of saving it and restoring it to its lawful owner, they were not trespassers. In such a case, though they had no permission from the plaintiff or any other person, they had an implied license by law to enter on the beach to save the property. It is a very ancient rule of the common law, that an entry upon land to save goods which are in jeopardy of being lost or destroyed by water, fire, or any like danger, is not a trespass. 21 H. VII, 27, 28, pl. 5. Bro. Ab. Trespass, 213. Vin. Ab. Trespass, (H. a. 4) pl. 24 *ad fin.*; (K. a.) pl. 3. In Dunwich *v.* Sterry, 1 B. & Ad. 831, a case very like this, Mr. Justice Parke (afterwards Baron Parke and Lord Wensleydale) left it to the jury to say whether the defendant took the property for the benefit of the owners, or under a claim of his own and to put the plaintiffs to proof of their title. In Barker *v.* Bates, 13 Pick. 255, upon which the plaintiff mainly relies, the only right claimed by the defendants was as finders of the property and for their own benefit.

The defendants are therefore entitled to a new trial. As the answer was not objected to, and the declaration may be amended in the court below, we have not considered the form of the pleadings.

New trial ordered.

47472

SEAVEY *v.* PREBLE.

SUPREME JUDICIAL COURT OF MAINE, 1874.

[*Reported* 64 *Me.* 120.]

WALTON, J. We perceive no objection to the form of the action in this case. It is well settled that trespass *quare clausum fregit* may be maintained by the owner of real estate for an injury to the freehold, notwithstanding it was in the possession of a tenant at will at the time of the alleged injury. Davis *v.* Nash, 32 Maine, 411.

But we think the verdict is clearly against evidence.

When the small-pox or any other contagious disease exists in any town or city the law demands the utmost vigilance to prevent its spread. "All possible care" are the words of the statute. R. S. c. 14, § 30.

To accomplish this object persons may be seized and restrained of their liberty or ordered to leave the State; private houses may be converted into hospitals and made subject to hospital regulations; buildings may be broken open and infected articles seized and destroyed, and many other things done which under ordinary circumstances would be considered a gross outrage upon the rights of persons and property. This is allowed upon the same principle that houses are allowed to be torn down to stop a conflagration. *Salus populi suprema lex* — the safety of the people is the supreme law — is the governing principle in such cases.

Where the public health and human life are concerned the law requires the highest degree of care. It will not allow of experiments to see if a less degree of care will not answer. The keeper of a furious dog or a mad bull is not allowed to let them go at large to see whether they will bite or gore the neighbor's children. Nor is the dealer in nitroglycerine allowed in the presence of his customers to see how hard a kick a can of it will bear without exploding. Nor is the dealer in gunpowder allowed to see how near his magazine may be located to a blacksmith's forge without being blown up. Nor is one using a steam engine to see how much steam he can possibly put on without bursting the boiler. No more are those in charge of small-pox patients allowed to experiment to see how little cleansing will answer; how much paper spit upon and bedaubed with small-pox virus it will do to leave upon the walls of the rooms where the patients have been confined. The law

will not tolerate such experiments. It demands the exercise of all possible care. In all cases of doubt the safest course should be pursued, remembering that it is infinitely better to do too much than run the risk of doing too little.

Unfortunately medical science has not yet arrived at that degree of perfection which will enable its practitioners to agree. There is scarcely a case tried where medical testimony is used, in which the doctors do not disagree. The swearing is sometimes so bitterly antagonistic as to make it painful to listen to it.

There is the usual conflict of medical testimony in this case. The defendant and other physicians called by him as witnesses express the opinion that it is necessary in order to cleanse a room in which small-pox patients have been confined to remove the paper from the walls. The plaintiff (himself a physician) and the other physicians called by him as witnesses express the opinion that it is not necessary. Several of them however admit that if the paper is loose, or the small-pox virus has actually come in contact with it, it should be removed.

Mrs. Liscomb, the nurse employed by the city to take care of this family, testifies that the paper needed to be taken off; that it was dirty around where the diseased folks were; that it was all dirty; that the spittle from the mouths of the patients flew upon it. Doctor Blaidsdell, who attended the family some two or three weeks before it came under the care of the defendant, testifies that he noticed the paper particularly about the bed and that it was a good deal soiled; that he supposed the patient must have spit a good deal and was not particular where he spit; that in such cases it is difficult to expectorate; that the more violent the disease the more adhesive the saliva; that there is usually a great deal of saliva in all cases; that in this case the patient lay against the wall some of the time and that when the patient is against the wall and soils the paper by saliva and by putting his hands upon it the best medical advice is to remove it and whitewash the wall with quicklime; that in this case he should have stripped off all the paper. Other physicians called by the defendant express substantially the same opinion.

Under these circumstances what was it the duty of the defendant to do? The small-pox seems to have been unusually prevalent. The defendant testifies that he had a hundred and seven cases during the winter. He was city physician. Upon his efforts in a large degree depended the safety of the city. He could not go to his medical brethren for direction, for they as usual were divided in opinion. The mandate of the law to him was "Use all possible care." Under these circumstances we think he was justified in advising the removal of the paper from the walls of the rooms in which the small-pox patients had been confined, and that the law protected him in so doing.

Motion sustained.

476742

PAUL v. SUMMERHAYES.

QUEEN'S BENCH DIVISION, 1878.

[*Reported L. R.* 4 *Q. B. D.* 9.]

CASE stated by justices under 20 & 21 Vict. c. 43, upon a conviction of the appellants upon an information for an assault.

The appellants were persons who, on the occasion in question, were engaged in hunting with a pack of foxhounds. In the pursuit of a fox, which the hounds were running, the appellants sought to enter upon a field forming part of a farm belonging to the respondent's father, which the respondent managed on his father's behalf. The respondent warned them off, and endeavoured to resist their entry on the field. For the purpose of overcoming his resistance to their entry, they committed the assault complained of, and the main question in the case was whether, under the above-mentioned circumstances, there was any justification for the assault. The justices convicted the appellants in the sums of 20*s.* and 10*s.* respectively.

LORD COLERIDGE, C. J. I am of opinion that the conviction should be affirmed. The statute 1 & 2 Wm. 4, c. 32, s. 35, really has no application to the case. That section of the statute merely provides that certain foregoing provisions shall not apply to persons in fresh pursuit of a fox. But, in truth, when the statute is examined, it will be seen that those provisions would not apply to the pursuit of the fox, the animal not being game. So the provisions of s. 35 seem only to have been put in *ex majori cautela*, to prevent certain penalties for a particular class of trespass, viz., trespass in pursuit of game, from applying to foxhunters. There is nothing, therefore, in the act to alter the common law with regard to trespass so far as concerns foxhunting. The real question is whether under the circumstances the respondent was justified in resisting the entry of the appellants on his father's land. I am of opinion that he was. It was suggested that there is authority that foxhunting in the popular, well understood, sense of the term, that is, as a sport, can be carried on over the land of a person without his consent and against his will, and the case of Gundry *v.* Feltham, 1 T. R. 334, was cited as authority for that proposition. I am of opinion that no such right as that claimed exists. The sport of foxhunting must be carried on in subordination to the ordinary rights of property. Questions such as the present fortunately do not often arise, because those who pursue the sport of foxhunting do so in a reasonable spirit, and only go upon the lands of those whose consent is expressly, or may be assumed to be tacitly, given. There is no principle of law that justifies trespassing over the lands of others for the purpose of foxhunting. The case of Gundry *v.* Feltham, 1 T. R. 334,

is distinguishable from the present case, and can be supported, if it is to be supported at all, only on the grounds suggested by Lord Ellenborough in the case of Lord Essex *v.* Capel, Locke on Game Laws, 45, to which we have been referred. The demurrer admitted that what was done was the only means for destroying the fox, and *Buller*, J., expressly puts his decision on that ground. The case was brought under the consideration of Lord Ellenborough in Lord Essex *v.* Capel, Locke on Game Laws, 45, and he was distinctly of opinion that, where any other object was involved than that of the destruction of a noxious animal, an entry on the land of another, against his will, could not be justified. In the case of Lord Essex *v.* Capel, Locke on Game Laws, 45, it had been pleaded that the means adopted were the only means, and also that they were the ordinary and proper means of destroying the fox. But the evidence clearly showed that in the case of foxhunting, as ordinarily pursued, the object of destroying the animal is only collateral. The interest and excitement of the chase is the main object. Lord Ellenborough, than whom there could be no higher authority on such a point, was of opinion that where this was the case, and where the real object was not the mere destruction of a noxious animal, a trespass could not be justified. If persons pursue the fox for the purpose of sport or diversion, they must do so subject to the ordinary rights of property. It would seem that there may be some doubt as to the validity of the justification even where the only object is the destruction of a noxious animal. The idea that there was such a right as that of pursuing a fox on another's land appears to have been based on a mere dictum of Brook, J., in the Year Book, 12 Hen. 8, p. 10. This dictum was not necessary for the decision of the case, for there the chasing of a fox was not in question, and the case went off on an entirely different point. It may well be doubted in my opinion whether, even if the case were one in which the destruction of a fox as a noxious animal was the sole object, there would be any justification. That question, however, does not, I think, arise here. It is enough to say that the case of Gundry *v.* Feltham, 1 T. R. 334, and the dictum of Brook, J., in the Year Book, 12 Hen. 8, p. 10, do not at all conflict with the opinion expressed by Lord Ellenborough in Lord Essex *v.* Capel, Locke on Game Laws, 45, which appears to me to be the true view of the law, viz., that a person has no right, in the pursuit of the fox as a sport, to come upon the land of another against his will. For these reasons our judgment must be for the respondent.

MELLOR, J. I am of the same opinion. The 1 & 2 Wm. 4, c. 32, has really no application to the case. The 31st section of the act contains certain provisions for preventing trespasses in pursuit of game. Foxes, however, are not game, and so not within the provisions of the section. In any case the exception in favour of foxhunting in the 35th section could only apply to the special provisions of the act for the protection of game, and could not affect the question whether a

trespass could be justified at common law in the course of hunting a fox, which is the real question in the case. That question has been fully discussed by my Lord. The counsel for the appellants did not venture to insist, in contravention of all common sense and experience, that the object of foxhunting, as ordinarily pursued, was the destruction of a noxious animal which does mischief to farmers and others. The case of Gundry *v.* Feltham, 1 T. R. 334, is therefore distinguishable. The view taken by Lord Ellenborough in the case of Lord Essex *v.* Capel, Locke on Game Laws, 45, in which the question was really the same as that in the present case, was quite consistent with the decision in Gundry *v.* Feltham, 1 T. R. 334, and it appears to me to be the only view that is possible consistently with common sense and the ordinary rights of property.[1]

Judgment for the respondent.

KELEHER *v.* PUTNAM. 47842

SUPREME COURT OF NEW HAMPSHIRE, 1880.

[*Reported* 60 *N. H.* 30.]

TRESPASS, for assault and false imprisonment. Plea, the general issue, with a brief statement. The plaintiff kept a small store in Manchester. Putnam, one of the defendants, was a county commissioner. The evidence tended to show that the plaintiff was afflicted with insane delusions, and disturbed her neighbors and the inmates of the house where she boarded. Physicians examined her, and said she ought to be cared for. Complaint being made to Putnam, he visited her, and, in answer to his inquiries, she informed him she had friends in Lawrence, Mass., and requested to be sent there.

He told her he would send a man with her. For that purpose he employed Reed, the other defendant, who called at the plaintiff's store with a carriage, and told her he had come to take her to Lawrence. She manifested a disposition not to go, and Reed partly pushed and partly carried her into the carriage, which was driven to the depot, where they entered a car and were taken to Lawrence. There he delivered her to the city marshal, whom he informed of the circumstances. The court instructed the jury that if the plaintiff requested Putnam to take her to Lawrence, or if she was insane or dangerous, or disturbing the neighborhood, and if he acted solely from the motive of placing her in the custody of her friends so that she might be properly cared for, and not to rid the county of a public charge, the defendants were not liable; and the plaintiff excepted. Verdict for the defendants.

BINGHAM, J. A county commissioner has no authority over in-

[1] See also Essex *v.* Capel, 4 Campb. Lives Ch. Just. 225, Ames Cas. Torts (3d ed.) 216.— ED.

sane persons by virtue of his office. The right of personal liberty is subject to some exceptions necessary to the common welfare of society. At common law a private citizen, without warrant, may lawfully seize and detain another in certain cases. It is justifiable to hold a man to restrain him from mischief. It is lawful to interfere in an affray which endangers the lives of the combatants. Other instances are enumerated in Colby *v.* Jackson, 12 N. H. 526. Under the right of self-defense it is lawful to seize and restrain any person incapable of controlling his own actions, whose being at large endangers the safety of others. But this is justifiable only when the urgency of the case demands immediate intervention. The right to exercise this summary remedy has its foundation in a reasonable necessity, and ceases with the necessity. A dangerous maniac may be restrained temporarily until he can be safely released, or can be arrested upon legal process, or committed to the asylum under legal authority. But not every insane person is dangerous. Nothing can be more harmless than some of the milder forms of insanity. Nor is it any justification that the defendants were actuated by a desire to promote the plaintiff's welfare. The right of personal liberty is deemed too sacred to be left to the determination of an irresponsible individual, however conscientious. The law gives these unfortunate persons the safeguards of legal proceedings and the care of responsible guardians. Davis *v.* Merrill, 47 N. H. 208; 22 Monthly Law Rep., 385; 6 South. Law Rev. (N. S.), 568; 3 Am. Law Rev., 193; Ray Insan., ss. 614–619. The legislature has established appropriate forms of proceeding for ascertaining their mental condition, imposing upon them, under the supervision of public functionaries, the restraint necessary to protect them from the imposition of others, and subjecting them to such treatment as may restore their reason. If the plaintiff requested to be taken to Lawrence, she revoked the license by resisting the removal. The instructions given to the jury were erroneous. The question was, whether the plaintiff's removal was reasonably necessary under the circumstances of the case. Cooley Torts, 176–179; Addison Torts, c. 12, s. 2.

Verdict set aside.

STANLEY, J., did not sit: the others concurred.

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47 9Jt2

FIELDS *v.* STOKLEY.

SUPREME COURT OF PENNSYLVANIA, 1882.

[*Reported* 99 *Pa.* 206.]

TRESPASS, by George F. Fields against William S. Stokley, to recover damages for the destruction of a wooden building belonging to the plaintiff which had been torn down and demolished by defend-

ant's orders. Pleas, not guilty, and a special plea, to which a demurrer was sustained.

Defendant then filed an additional plea, all the facts set forth in which were admitted on the trial, to wit: That the defendant was, in September, 1876, at the date of the alleged trespass, mayor of Philadelphia, and also a citizen, tax-payer, and property owner; that the United States Centennial Exhibition was then in progress at Fairmount Park; that the plaintiff and others, in violation of an ordinance of councils, had erected on Elm Avenue, bordering on the Exhibition grounds, numbers of wooden booths, sheds, shanties, and buildings, composed wholly of highly combustible materials, insufficiently provided with chimneys or protected against fire, that of the plaintiff being occupied as a bar-room, and the resort of disorderly persons; that the said premises were in close proximity to the buildings of the city, State, and other buildings of the International Exposition, which were thereby imperiled. That the grand jury made a special presentment to the quarter sessions of the said wooden buildings as common nuisances, dangerous to life and property, whereupon the judge then holding said court, ordered the defendant, as mayor, to abate said nuisance by tearing down and removing said buildings, if the owners thereof, after forty-eight hours' notice, failed so to do; and the plaintiff having failed to remove the building in question after notice, the defendant caused the same to be torn down, doing as little damage as he reasonably could, etc.

It further appeared on the trial, before *Peirce*, J., that the plaintiff had leased the lots whereon the building in question was erected; that it was so erected without a permit from the building inspectors, and without authority from councils, the mayor having vetoed an ordinance which had been passed permitting its erection; the plaintiff and his builder admitted that they knew they were erecting the building in violation of law.

The plaintiff requested the court to instruct the jury: "That the defendant acted wholly without authority of law in tearing down the building of the plaintiff, and he is liable for the damage resulting from his commands, and the jury should find a verdict for the plaintiff for the amount of damages which they believed, according to the evidence, he sustained." *Answer.* I do not affirm that point; on the contrary, I negative it, leaving to you the question of nuisance, or no nuisance; then if no nuisance, the plaintiff is entitled to any damage sustained; and if nuisance, if the plaintiff maintained a nuisance there, then he is not entitled to any damages."

In the general charge the judge said: "The first question which arises in this case is, was or was not this building, thus taken down by the mayor, a nuisance? Was it such a common peril to the welfare of the citizens of Philadelphia, and to all who were to assemble here and visit the great exhibition, to the property exposed to danger, as to

amount to a nuisance? . . . If you find it to be a nuisance, then I say that the defendant must justify himself under the fact that it was a nuisance, and especially acting as the head of a great municipality; acting under the order of a judge of a court; acting upon the presentment of a grand jury, all tend to show that it was not mere private thought or feeling, that he was not prompted to it by any desire to do any particular wrong to this individual. . . . You will look at the whole case carefully, and at the facts and the law as I have given it to you, and if you find the plaintiff was maintaining a nuisance there, then he is not entitled to recover at all, and your verdict should be for the defendant. If, on the contrary, there was no nuisance there, then you will give such damages as the plaintiff would be entitled to recover under the evidence and facts as they have been testified to here."

Verdict and judgment for defendant. The plaintiff took this writ of error, signing for error (1) the refusal of the court to affirm his point, as above, and (2) "that the entire charge was calculated to mislead the jury in this, that a wooden building erected on private freehold could be a public nuisance; and that, without conviction on indictment, or a decree of a court, an individual who was a mayor could abate it at his will."

SHARSWOOD, C. J. It appears by the record before us that it was expressly agreed, after the trial had progressed some time, that all the facts set forth in the special plea, not already proved, should be considered as having been proved. The plea, *inter alia*, avers that the houses mentioned in the declaration and for the removal of which this action was brought were composed wholly of highly inflammable and combustible materials, and were insufficiently provided with chimneys and the usual and ordinary appliances for protection against fire, and were so used constantly, night and day, by drunken and disorderly persons, that the lives, health, and property of citizens were greatly endangered and the public safety imperiled. The question whether they were a public nuisance was fairly submitted to the jury by the learned judge below, and the verdict of the jury in favor of the defendant established that fact. Had the presentment by the grand jury been followed up by an indictment, trial, and conviction of the plaintiff below, the judgment thereon would have been that the nuisance should be abated, and would have been a conclusive justification of the action of the defendant. The defendant was the mayor of the city, and charged with the conservation of the peace and the protection of the property of the city. He was the representative of the city. It is true that a wooden building, though erected contrary to law, is not *per se* a public nuisance. But it may become such by the manner in which it is used or allowed to be used. It is true that a private person not specially aggrieved cannot abate a public nuisance, and especially where a statute provides a remedy for an offense created by it, that must be followed. It is well settled, however, that a private person, if specially ag-

grieved by a public nuisance, may abate it. In Rung v. Shoneberger, 2 Watts, 23, it was held by this court that the erection of a building upon the public square of a town was a public and not a private offense, and may be abated by any one aggrieved. In that case the buildings were removed by officers of the town by virtue of the authority of the town council, and the persons in possession, and who had erected the buildings, had recovered in an action of trespass. The judgment, however, was reversed, Mr. Justice Rogers saying, "A nuisance, whether public or private, may be abated by the party aggrieved, so that it is done peaceably and without a riot. The reason (says Blackstone, 3 Com. 5) why the law allows this private and summary method of doing justice, is because injuries which obstruct or arrest such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice." The jury, under the charge of the learned judge, has found these buildings to be of that character. The city of Philadelphia was the owner of large and valuable property in their neighborhood. Any hour of the day or night they were in danger of being set on fire by those who frequented them with the owner's permission. It is stated as a fact in the special plea, and of course a fact admitted by the agreement, that the public safety was imperiled. Nothing more was necessary to justify the action of the defendant. If the owner or tenant of a powder magazine should madly or wickedly insist upon smoking a cigar on the premises, can any one doubt that a policeman or even a neighbor could justify in trespass for forcibly ejecting him and his cigar from his own premises? It is true, that a private person assuming to abate a public nuisance takes upon himself the responsibility of proving to the satisfaction of a jury, the fact of nuisance. The official position of the defendant, as mayor of Philadelphia, did not relieve him from his personal responsibility in this respect. But he has been sustained by the verdict of the jury, which is a justification of his alleged trespass. We are of opinion that this case was properly submitted to the determination of the jury, that there was nothing in the charge calculated to mislead them, and that it would have been manifest error if the learned judge had affirmed the plaintiff's point, and thereby in effect instructed the jury to find a verdict in his favor.[1]

Judgment affirmed.

[1] See also Jones v. Williams, 11 M. & W. 176; Brown v. Perkins, 12 Gray, 89; Meeker v. Van Rensselaer, 15 Wend. 397. — Ed.

4837L2

STATE v. GUT.

SUPREME COURT OF MINNESOTA, 1868.

[*Reported* 13 *Minn.* 341.]

WILSON, C. J. The defendant was indicted for the murder of Charles Campbell, and having been tried, was found guilty, on the 31st day of January, and sentenced on the 1st day of February following.[1] . . .

It is admitted in the bill of exceptions that the evidence on the part of the State established the fact that, at New Ulm, in the county of Brown, and State of Minnesota, on the 25th day of December, 1866, Alexander Campbell, the person named in the said indictment, and one George Liscome, were arrested at the saloon known as the National Hall saloon, in the said town of New Ulm, by the sheriff and other officers of the said county of Brown, and taken to and confined in the jail of said county, which said jail was but a short distance from said saloon. That at the time the said arrest was made a report was very generally circulated through said town to the effect that two half-breeds had murdered John Spinner. That in about twenty-five or thirty minutes after the same was first circulated, a large crowd of over one hundred men, very much excited, assembled at said jail. That great noise and confusion prevailed in said crowd, and the prevailing cry was, bring out the halfbreeds, hang the halfbreeds, out with the Indians. That one of the said witnesses for the State, to wit, George Schneider, testified that the crowd called out that Campbell was the brother of the halfbreed Campbell whom the people had recently hanged at Mankato for the murder of white people.

That the defendant, John Gut, arrived at said jail after the said crowd had principally assembled there, and about the time the said crowd broke open the said jail and brought out the said Campbell; that the said Gut had no knowledge of the purpose of said crowd in assembling at said jail, until after his arrival there, and all he learned concerning the intention and purpose of said crowd was from the outcry of said crowd, and what he saw after his arrival at said jail; that when said Gut was reproved by the witness for the stabbing of the prisoners, he replied: These two halfbreeds killed my best friend, John Spinner, and I will kill them; let me alone or I will stab you! That said crowd did break open said jail, and did take out said Campbell, and did hang him by the neck until he was dead, and that said John Gut did participate in the doings of said crowd by stabbing said Campbell with a knife, both before and after he was hanged by said crowd. That said Campbell and Liscome before they were arrested in said saloon were

[1] Only so much of the opinion as considers the defense discussed is given. — ED.

dressed as follows: Said Campbell had on his head a hood made of dark blue cloth, or blanket, such as is worn by the Sioux Indians. That one of said parties, either Campbell or Liscome, had on Indian moccasins.

That both said Campbell and Liscome wore belts on the outside of all their clothing, in which belts were knife sheaths, and when seen in said saloon by the State witnesses, they had their knives in their hands. . . . The evidence offered to prove that a state of war existed between the United States and Sioux Indians, and that the State, through its legal authorities, had offered a reward for the killing of any male of that tribe, was properly rejected. That it is legal to kill an alien enemy in the heat and exercise of war, is undeniable: but to kill such an enemy after he has laid down his arms, and especially when he is confined in prison, is murder. 1 Bish. Cr. Law, 102; 2 Ib., 668.

The evidence that war existed between the Sioux Indians and the United States, and that the deceased was supposed to be a Sioux Indian, was therefore immaterial.

It is not pretended that there was a law of our State authorizing the killing of a male of that tribe, and the proclamation or order of any officer of the State could not make that right which is wrong, or legal which is illegal. If such a proclamation or order was made, and if on account thereof any ignorant person was misled into the commission of crime, it is for the governor to determine whether that would be a proper case for the exercise of executive clemency.

O'BRIEN v. CUNARD STEAMSHIP CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1891.

[*Reported* 154 *Mass.* 272.]

TORT, for an assault, and for negligently vaccinating the plaintiff, a steerage passenger on the steamship Catalonia. Trial in the Superior Court, before *Staples*, J., who ruled that, upon the evidence, the plaintiff could not maintain the action, and ordered a verdict for the defendant; and the plaintiff alleged exceptions. The nature of the evidence appears in the opinion.

KNOWLTON, J. This case presents two questions: first, whether there was any evidence to warrant the jury in finding that the defendant, by any of its servants or agents, committed an assault on the plaintiff; secondly, whether there was evidence on which the jury could have found that the defendant was guilty of negligence towards the plaintiff. To sustain the first count, which was for an alleged assault, the plaintiff relied on the fact that the surgeon who was em-

ployed by the defendant vaccinated her on shipboard, while she was on her passage from Queenstown to Boston. On this branch of the case the question is whether there was any evidence that the surgeon used force upon the plaintiff against her will. In determining whether the act was lawful or unlawful, the surgeon's conduct must be considered in connection with the circumstances. If the plaintiff's behavior was such as to indicate consent on her part, he was justified in his act, whatever her unexpressed feelings may have been. In determining whether she consented, he could be guided only by her overt acts and the manifestations of her feelings. Ford *v.* Ford, 143 Mass. 577, 578. McCarthy *v.* Boston & Lowell Railroad, 148 Mass. 550, 552. It is undisputed that at Boston there are strict quarantine regulations in regard to the examination of immigrants, to see that they are protected from small-pox by vaccination, and that only those persons who hold a certificate from the medical officer of the steamship, stating that they are so protected, are permitted to land without detention in quarantine or vaccination by the port physician. It appears that the defendant is accustomed to have its surgeons vaccinate all immigrants who desire it, and who are not protected by previous vaccination, and give them a certificate which is accepted at quarantine as evidence of their protection. Notices of the regulations at quarantine, and of the willingness of the ship's medical officer to vaccinate such as needed vaccination, were posted about the ship, in various languages, and on the day when the operation was performed the surgeon had a right to presume that she and the other women who were vaccinated understood the importance and purpose of vaccination for those who bore no marks to show that they were protected. By the plaintiff's testimony, which in this particular is undisputed, it appears that about two hundred women passengers were assembled below, and she understood from conversation with them that they were to be vaccinated; that she stood about fifteen feet from the surgeon, and saw them form in a line and pass in turn before him; that he "examined their arms, and, passing some of them by, proceeded to vaccinate those that had no mark"; that she did not hear him say anything to any of them; that upon being passed by they each received a card and went on deck; that when her turn came she showed him her arm, and he looked at it and said there was no mark, and that she should be vaccinated; that she told him she had been vaccinated before and it left no mark; "that he then said nothing, that he should vaccinate her again"; that she held up her arm to be vaccinated; that no one touched her; that she did not tell him that she did not want to be vaccinated; and that she took the ticket which he gave her certifying that he had vaccinated her, and used it at quarantine. She was one of a large number of women who were vaccinated on that occasion, without, so far as appears, a word of objection from any of them. They all indicated by their conduct that they desired

to avail themselves of the provisions made for their benefit. There was nothing in the conduct of the plaintiff to indicate to the surgeon that she did not wish to obtain a card which would save her from detention at quarantine, and to be vaccinated, if necessary, for that purpose. Viewing his conduct in the light of the circumstances, it was lawful; and there was no evidence tending to show that it was not. The ruling of the court on this part of the case was correct.[1]

Exceptions overruled.

4867742

SCANLON *v.* WEDGER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1892.

[*Reported* 156 *Mass.* 462.]

ALLEN, J. The several plaintiffs were injured by the explosion of a bomb or shell during a display of fireworks in Broadway Square, which was a public highway in Chelsea. This display was made by the defendant Wedger, who acted under a license from the mayor and aldermen of Chelsea for a display of fireworks in Broadway Square on that evening, under Pub. Sts. c. 102, § 55. A verdict was returned for the defendant, and the jury made a special finding that the defendant in firing the bomb exercised reasonable care. The case comes to us on a report which states that if, on the facts contained therein, and on said finding, the plaintiffs are entitled to recover, the case is to be remitted to the Superior Court for the assessment of damages; otherwise, judgments are to be entered for the defendant. It is therefore to be considered whether it appears affirmatively that the plaintiffs were entitled to recover.

The plaintiffs apparently were present at the display of fireworks as voluntary spectators, and were of ordinary intelligence. No fact is stated in the report to show the contrary, nor has any suggestion to that effect been made in the argument. The plaintiffs have not rested their claims at all upon the ground that they were merely travelers upon the highway, or that they were unaware of the nature and risk of the display. The report says: "A considerable number of persons were attracted to said square by said meeting, and said bombs and other fireworks which were being exploded there. . . . A portion of the center of said square, about forty by sixty feet, was roped off by the police of said Chelsea, and said bombs or shells were fired off within the space so inclosed, and no spectators were allowed to be within said inclosure. . . . The plaintiffs were lawfully in said highway at the time of the explosion of said mortar, and near said ropes, and were in the exercise of due care."

[1] The remainder of the opinion, dealing with the question of negligence, is omitted. — ED.

The bombs or shells are described in the report, and they were to be thrown from mortars into the air, it being intended that they should explode in the air and display colored lights. They were apparently a common form of fireworks, such as has long been in use.

The ground on which the plaintiffs place their several cases is, that the Pub. Sts. c. 102, § 55, did not authorize the mayor and aldermen of Chelsea to license the firing of anything but rockets, crackers, squibs, or serpents, and that therefore the act of the defendant in firing bombs or shells was unauthorized and unlawful. It is not contended that it was at the time supposed, either by the defendant or by anybody else, that the license was insufficient to warrant the display which was actually made. The licensee was the chairman of a committee which had a political meeting in charge, and the defendant acted at the request of the committee, and was directed by them as to when and where to fire off the fireworks.

Under this state of things it must be considered that the plaintiffs were content to abide the chance of personal injury not caused by negligence, and that it is immaterial whether there was or was not a valid license for the display. If an ordinary traveler upon the highway had been injured, different reasons would be applicable. Vosburgh *v.* Moak, 1 Cush. 453. Jenne *v.* Sutton, 14 Vroom, 257. Conradt *v.* Clauve, 93 Ind. 476. But a voluntary spectator, who is present merely for the purpose of witnessing the display, must be held to consent to it, and he suffers no legal wrong if accidentally injured without negligence on the part of any one, although the show was unauthorized. He takes the risk. See Pollock on Torts, 138–144.[1]

In the opinion of a majority of the court, the entry must be,

Judgments for the defendant.

MORTON, J., dissented.

HOWLAND *v.* BLAKE MANUFACTURING CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1892.

[*Reported* 156 *Mass.* 543.]

TORT, by Alfred H. Howland and George A. Ellis, copartners doing business as Howland and Ellis, for libel.

The declaration alleged that the plaintiffs were civil engineers and contractors, and that the defendant published, circulated, and caused to be published and circulated, a false and malicious libel concerning the plaintiffs, a copy whereof was annexed, whereby the plaintiffs were greatly damaged in their business as well as in their reputation, and especially had suffered great damage and loss of profits on contracts

[1] See also Johnson *v.* New York, 186 N. Y. 139. — ED.

and employment in their business as civil engineers and contractors for the building and construction and superintendence of the construction of water works.

Trial in the Superior Court before *Blodgett*, J.

John G. Berry, called as a witness for the plaintiffs, testified that he was a civil engineer in the employ of the plaintiffs; that on March 15, 1889, he went to the office of the defendant, and there saw Foran, who gave him a copy of the Maynard Enterprise extra, saying, "Read it at your leisure, and show it to your water committee"; that the witness had told Foran that he had friends in Marion, Ohio, who were interested in the water works which were to be put in there by the plaintiffs; that thereupon Foran gave a start, and said, "Hold on a minute, I have got something to show you"; and that Foran then went to his desk, got out the paper, and handed it to him.

On cross-examination, the witness testified that he went there with the purpose and intention of getting one of those papers if he could; and that he did not tell Foran that he was in the plaintiffs' employ.[1]

The jury returned a verdict for the defendant; and the plaintiffs alleged exceptions.

KNOWLTON, J. . . . The jury were instructed that, "if the defendant gave a copy of the libel to Berry, there having been no previous publication by the defendant, and Berry in procuring such copy acted as the agent of the plaintiffs, and at their request, and such publication was procured with the view to bringing action, the publication was privileged." This was in accordance with views expressed by English judges, and was sound in principle. Rogers *v.* Clifton, 3 Bos. & P. 587, 592. Duke of Brunswick *v.* Harmer, 14 Q. B. 185. King *v.* Waring, 5 Esp. 13. Smith *v.* Wood, 3 Camp. 323. Odgers, Libel and Slander, 229. If the defendant is guilty of no wrong against the plaintiff except a wrong invited and procured by the plaintiff for the purpose of making it the foundation of an action, it would be most unjust that the procurer of the wrongful act should be permitted to profit by it.

Exceptions overruled.

488882

SHINGLEMEYER *v.* WRIGHT.

SUPREME COURT OF MICHIGAN, 1900.

[*Reported* 124 *Mich.* 230.]

THIS is a suit by one Katherina Shinglemeyer against Oliver A. Wright by *capias* for an alleged slander claimed to have been uttered

[1] Only so much of the evidence, record, and opinion as discusses the question of plaintiffs' consent is given. — ED.

by defendant to one Henry, a policeman, upon the 16th of July, 1898, and for a false imprisonment.[1]

Plaintiff testified that . . . she went to [defendant's] office in the Chamber of Commerce Building; that Oliver Wright said, "Did you bring my wheel back?" and that she said, "I ain't got your old wheel"; and he said, "Yes, you have stolen my wheel," and said that he could prove it. At the time of this conversation there was no one present besides plaintiff and the defendant. She also claims that he stated that he would have a warrant out for her if she did not leave his office. Thereupon she went to the telephone, and called up the central police station, and asked them to send over an officer. After she had called up the police station she left the office, went down the elevator, and near the door met the policeman Henry. She brought the policeman back to Mr. Wright's office, and herself stated to the policeman that Mr. Wright accused her of stealing his wheel, and that she wanted to see whether he could do so. The policeman went into Mr. Wright's private office.

Thomas Henry, the officer, testified that when he entered the office he asked what the trouble was; that the plaintiff said first, "He accuses me of stealing his bicycle, and says I am a thief, and I am going to make him prove it"; that the defendant said Detectives High and Larkins were looking for her, and that he [defendant] had learned that a woman had checked a man's wheel from Detroit to Toledo by the Lake Shore baggageman.[2]

LONG, J. In regard to the statement by defendant in the presence of the officer Henry, it was not a publication for which the law gives a remedy. She herself solicited the statement, and sent for the officer for the express purpose of having the defendant repeat the statement in his presence. It would not have been stated to him except by her invitation. She might have left the respondent's office. She waited some time for the officer to come, and then left, and, meeting the officer as she emerged from the building, came back with him for no other purpose than to ask him to repeat the statement in his presence. In Cristman *v.* Cristman, 36 Ill. App. 567, plaintiff was suspected of an assault with intent to murder. The defendant suspected the plaintiff, and so stated to an officer. Plaintiff took one King with him, and went to defendant's house. King asked her, in the presence of plaintiff, if she had any idea who did it, to which defendant replied: "There is only two mean enough to do it, and Johnnie is one of them. Johnnie is the only one that would do it, and he is the one that did do it." Held that plaintiff could not recover. Where one received a letter containing libelous statements, and himself read the letter to others, held that he could not recover. Sylvis *v.* Miller, 96 Tenn. 94, 33 S. W.

[1] Only so much of the case as deals with the alleged slander is given. — ED.

[2] In this statement of the evidence only so much is given as bears on the alleged slander. — ED.

921. There is no difference in principle between reading a letter to another and soliciting a person to make a similar verbal statement. Where one sought from the superintendent of a railroad company a letter of recommendation for his friend, which letter was given, containing a statement that the person had left the service of the company during a strike, held that this was not publishing a libel. Railroad Co. *v.* Delaney, 52 S. W. 151, 45 L. R. A. 600. The following cases sustain the same doctrine: Bank *v.* Bader, 59 Minn. 329, 61 N. W. 328; Heller *v.* Howard, 11 Ill. App. 554; Fonville *v.* McNease, 1 Dud. (S. C.) 303; King *v.* Waring, 5 Esp. 13; Smith *v.* Wood, 3 Camp. 323; Haynes *v.* Leland, 29 Me. 233. Plaintiff repeatedly testified that she sent for the policeman to see if she did steal his wheel, and that she was going to make him prove it. The maxim, *Volenti non fit injuria*, applies.

490ff2

VOSBURG *v.* PUTNEY.

SUPREME COURT OF WISCONSIN, 1891.

[*Reported* 80 *Wis.* 523.]

THE action was brought to recover damages for an assault and battery, alleged to have been committed by the defendant upon the plaintiff on February 20, 1889. The answer is a general denial. At the date of the alleged assault the plaintiff was a little more than fourteen years of age, and the defendant a little less than twelve years of age.

The injury complained of was caused by a kick inflicted by defendant upon the leg of the plaintiff, a little below the knee. The transaction occurred in a schoolroom in Waukesha, during school hours, both parties being pupils in the school.

LYON, J.[1] Had the parties been upon the playgrounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the playgrounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school, and necessarily unlawful. Hence we are of the opinion that, under the evidence and verdict, the action may be sustained.

[1] Part only of the opinion is given. — ED.

MARKLEY v. WHITMAN. 4 9172

SUPREME COURT OF MICHIGAN, 1893.

[*Reported* 95 *Mich.* 236.]

LONG, J. Plaintiff and defendant were both students at the Buchannan High School. On February 7, 1890, while the plaintiff was on his way home from school, the defendant and others of the scholars were engaged in what is called a "rush" or "horse game." The practice of the game is to find some one in advance, when the others form in a line, each one in the rear pushing the one in advance of him, and so on through the line until the one to be "rushed," who knows nothing of what is coming, is rushed upon by the one in his rear, and pushed or rushed. On the day in question the plaintiff, while going towards home on the sidewalk, was to be rushed. The defendant was in his immediate rear, and engaged in the game. When pushed, he rushed upon the plaintiff, striking him with his hands between the shoulders with such violence that the plaintiff was thrown nearly to the ground. Immediately thereafter he lost his voice above a whisper, and has never recovered its use. His neck was nearly fractured, and for several months he was compelled to take medical treatment in Chicago. It is claimed that he suffered great pain, and has not fully recovered. This action was brought to recover for the injuries thus occasioned. On the trial in the court below, the plaintiff had verdict and judgment for $2,500. Defendant brings error.

The errors relied upon relate principally to the charge of the court. It was claimed on the trial in the court below:

1. That the push against the plaintiff was not an assault, and therefore not actionable.
2. That it was a pure accident.
3. That it was not a dangerous game, and the results which followed from the push could not have been anticipated.
4. That the defendant only put himself in a position ready to be pushed if the spirit of frolic should be entered into by those behind him, and his rush upon the plaintiff was neither invited nor approved.
5. That there was no unlawful intent to injure the plaintiff.

It is insisted that the court below, in its charge, entirely ignored the claim of the defendant made on the trial; and also that the plaintiff was one of the school-fellows, and stood in a different position to the defendant than would a stranger. The court instructed the jury substantially that, if the plaintiff was participating in the play, or in any way contributed to the injury, he could not recover; that, to entitle the plaintiff to recover, he must show by a preponderance of evidence that the injury was occasioned by the push given by the defend-

ant, and that the defendant either wilfully pushed the plaintiff, or was voluntarily engaged in the game, which must be found to be dangerous, and one reasonably calculated to be dangerous to innocent persons lawfully traveling along the sidewalk upon which the play was conducted. The court below further instructed the jury as follows:

"If the game in question was a dangerous one to indulge in on the street and at the time in question, and if the defendant was voluntarily engaged in such play at the time of the accident, and if the plaintiff was not participating in such sport, and was not guilty of conduct which in any way contributed to the injury, but, on the contrary, was lawfully traveling on the sidewalk, and in the exercise of reasonable care, and if the defendant, while so playing, pushed the plaintiff and injured him, he is liable; and in such case it is no excuse for him to say that he himself was pushed against the plaintiff by some other boy."

This charge fully protected the rights of the defendant, and was as favorable to him as the facts of the case warranted. In fact, on the trial it was little in dispute that the injury occurred exactly as the plaintiff claimed. He was peaceably walking along the street, and had no intimation that he was to be "rushed." He was not participating in the game, and, if his testimony is true, never had taken part in it, and on that occasion was not anticipating that he was the victim selected to be rushed. It was an assault upon him, and the court correctly stated the rules of law applicable to the case; at least, the defendant had no reason to complain. It is evident that the defendant was one of those engaged in the game, which, upon a bare statement of the manner in which it is to be played, must be regarded as dangerous. He voluntarily engaged in it, and his conduct occasioned the injury. It was unlawful to "rush" the plaintiff under the circumstances shown, and the defendant must be held responsbile for the consequences which followed. It may be, and probably is, true that those taking part in it did not anticipate the injurious effects upon the plaintiff; but that does not lessen the plaintiff's pain and suffering, or make the act less unlawful. The plaintiff, while passing along the street, and not engaged in the sport, had the same right to be protected from such an assault as a stranger would have had, and the assault upon him was as unlawful as it would have been upon a stranger.

We find no error in the case, and the judgment must be affirmed, with costs.

HOOKER, C. J., MCGRATH and GRANT, JJ., concurred. MONTGOMERY, J., did not sit.[1]

[1] See also Fitzgerald v. Cavin, 110 Mass. 153; Wartman v. Swindell, 54 N. J. L. 589, 25 Atl. 356. — ED.

493 Fdc

OLLET v. PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY CO.

SUPREME COURT OF PENNSYLVANIA, 1902.

[*Reported* 201 *Pa.* 361.]

TRESPASS for an alleged unlawful imprisonment.

At the trial the court entered a compulsory nonsuit which it subsequently refused to take off, *Shafer*, J., filing the following opinion:

The action is for false imprisonment. The plaintiff was a boy seventeen years of age, and while endeavoring to climb upon a freight train of the defendant company fell from it. The wheel ran over his foot, crushing the front part of it. He was immediately taken to a private house, the only one in the neighborhood, and the crew of the freight train on which he was injured having run to Carnegie, a distance of one or two miles, came back again to the house with the engine, and finding the boy in the house, and no one present except a young woman who lived there, took him on the engine to Carnegie, where the company's physician was in attendance. An uncle of the boy who lived in Carnegie was also at the station when the boy was brought there, and upon the advice of the company's doctor, and accompanied by the uncle, he was taken to the West Penn Hospital, where his foot was afterwards amputated.

At the time of the accident one or more other boys were present, and one of them had gone to Carnegie to call the family physician of the boy's father, and another had gone to the house of the boy's father to call him, the distance to each being a mile or two, and the roads being very muddy. When the crew of the train got to the house they were told by the boy that his family physician had been sent for, and that he did not want to go the hospital, but they insisted that he should; carried him out; put him on the tender of the engine. This removal of the boy from the house by the railroad to Carnegie, and thence to the hospital, is the false imprisonment complained of.

That the crew of the train, in doing what they did, were endeavoring to act the part of the good Samaritan is perfectly plain, and we do not see how a jury could be allowed to find otherwise from the evidence. The circumstances certainly seemed to call for great haste, and one who endeavors to assist his neighbor who is in great danger and distress is certainly not liable for a mistake in judgment; nor does there appear to have been any such mistake made in this case.

In addition, we do not see how the railroad company could be held

liable for a false imprisonment on these acts of its employees, which were certainly not done within the scope of their employment, which was that of a crew of a freight train.

The motion to take off the nonsuit is refused.

PER CURIAM. This judgment is affirmed on the opinion of the court below refusing to take off the nonsuit.

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4 94 2 2

MOHR v. WILLIAMS.

SUPREME COURT OF MINNESOTA, 1905.

[*Reported* 95 *Minn.* 261.]

ACTION in the district court for Ramsey County to recover $20,000 damages for assault and battery consisting of an alleged unauthorized surgical operation performed by defendant upon plaintiff's ear. The case was tried before *Olin B. Lewis*, J., and a jury, which rendered a verdict in favor of plaintiff for $14,322.50. From separate orders granting a motion for a new trial and denying a motion for judgment, notwithstanding the verdict, plaintiff and defendant respectively appealed. Orders affirmed.

BROWN, J. Defendant is a physician and surgeon of standing and character, making disorders of the ear a specialty, and having an extensive practice in the city of St. Paul. He was consulted by plaintiff, who complained to him of trouble with her right ear, and, at her request, made an examination of that organ for the purpose of ascertaining its condition. He also at the same time examined her left ear, but, owing to foreign substances therein, was unable to make a full and complete diagnosis at that time. The examination of her right ear disclosed a large perforation in the lower portion of the drum membrane, and a large polyp in the middle ear, which indicated that some of the small bones of the middle ear (ossicles) were probably diseased. He informed plaintiff of the result of his examination, and advised an operation for the purpose of removing the polyp and diseased ossicles. After consultation with her family physician, and one or two further consultations with defendant, plaintiff decided to submit to the proposed operation. She was not informed that her left ear was in any way diseased, and understood that the necessity for an operation applied to her right ear only. She repaired to the hospital, and was placed under the influence of anæsthetics; and, after being made unconscious, defendant made a thorough examination of her left ear, and found it in a more serious condition than her right one. A small perforation was discovered high up in the drum membrane,

hooded, and with granulated edges, and the bone of the inner wall of the middle ear was diseased and dead. He called this discovery to the attention of Dr. Davis — plaintiff's family physician, who attended the operation at her request — who also examined the ear and confirmed defendant in his diagnosis. Defendant also further examined the right ear, and found its condition less serious than expected, and finally concluded that the left, instead of the right, should be operated upon, devoting to the right ear other treatment. He then performed the operation of ossiculectomy on plaintiff's left ear, removing a portion of the drum membrane, and scraping away the diseased portion of the inner wall of the ear. The operation was in every way successful and skillfully performed. It is claimed by plaintiff that the operation greatly impaired her hearing, seriously injured her person, and, not having been consented to by her, was wrongful and unlawful, constituting an assault and battery; and she brought this action to recover damages therefor.

The trial in the court below resulted in a verdict for plaintiff for $14,322.50. Defendant thereafter moved the court for judgment notwithstanding the verdict, on the ground that, on the evidence presented, plaintiff was not entitled to recover, or, if that relief was denied, for a new trial on the ground, among others, that the verdict was excessive, appearing to have been given under the influence of passion and prejudice.[1]

"We come then to a consideration of the questions presented by defendant's appeal from the order denying his motion for judgment notwithstanding the verdict. It is contended that final judgment should be ordered in his favor for the following reasons: (*a*) That it appears from the evidence received on the trial that plaintiff consented to the operation on her left ear. (*b*) If the court shall find that no such consent was given, that, under the circumstances disclosed by the record, no consent was necessary. (*c*) That, under the facts disclosed, an action for assault and battery will not lie, it appearing conclusively, as counsel urge, that there is a total lack of evidence showing or tending to show malice or an evil intent on the part of defendant, or that the operation was negligently performed.

We shall consider first the question whether, under the circumstances shown in the record, the consent of plaintiff to the operation was necessary. If, under the particular facts of this case, such consent was unnecessary, no recovery can be had, for the evidence fairly shows that the operation complained of was skillfully performed and of a generally beneficial nature. But if the consent of plaintiff was necessary, then the further questions presented become important. This particular question is new in this State. At least, no case has been called to our attention wherein it has been discussed or decided, and very few cases are cited from other courts. We have given it very

[1] So much of the opinion as discusses the question of a new trial is omitted. — ED.

deliberate consideration, and are unable to concur with counsel for defendant in their contention that the consent of plaintiff was unnecessary.

The evidence tends to show that, upon the first examination of plaintiff, defendant pronounced the left ear in good condition, and that, at the time plaintiff repaired to the hospital to submit to the operation on her right ear, she was under the impression that no difficulty existed as to the left. In fact, she testified that she had not previously experienced any trouble with that organ. It cannot be doubted that ordinarily the patient must be consulted, and his consent given, before a physician may operate upon him.

It was said in the case of Pratt *v.* Davis, 37 Chicago Leg. News, 213, referred to and commented on in 60 Cent. Law J., 452: "Under a free government, at least, the free citizen's first and greatest right, which underlies all others — the right to the inviolability of his person; in other words, the right to himself — is the subject of universal acquiescence, and this right necessarily forbids a physician or surgeon, however skillful or eminent, who has been asked to examine, diagnose, advise, and prescribe (which are at least necessary first steps in treatment and care), to violate, without permission, the bodily integrity of his patient by a major or capital operation, placing him under an anæsthetic for that purpose, and operating upon him without his consent or knowledge."

1 Kinkead Torts, § 375, states the general rule on this subject as follows: "The patient must be the final arbiter as to whether he shall take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognizes as a legal right. Consent, therefore, of an individual, must be either expressly or impliedly given before a surgeon may have the right to operate." There is logic in the principle thus stated, for in all other trades, professions, or occupations contracts are entered into by the mutual agreement of the interested parties, and are required to be performed in accordance with their letter and spirit. No reason occurs to us why the same rule should not apply between physician and patient. If the physician advises his patient to submit to a particular operation, and the patient weighs the dangers and risks incident to its performance, and finally consents, he thereby, in effect, enters into a contract authorizing his physician to operate to the extent of the consent given, but no further.

It is not, however, contended by defendant that under ordinary circumstances consent is unnecessary, but that, under the particular circumstances of this case, consent was implied; that it was an emergency case, such as to authorize the operation without express consent or permission. The medical profession has made signal progress in solving the problems of health and disease, and they may justly point with pride to the advancements made in supplementing nature and correct-

ing deformities, and relieving pain and suffering. The physician impliedly contracts that he possesses, and will exercise in the treatment of patients, skill and learning, and that he will exercise reasonable care and exert his best judgment to bring about favorable results. The methods of treatment are committed almost exclusively to his judgment, but we are aware of no rule or principle of law which would extend to him free license respecting surgical operations. Reasonable latitude must, however, be allowed the physician in a particular case; and we would not lay down any rule which would unreasonably interfere with the exercise of his discretion, or prevent him from taking such measures as his judgment dictated for the welfare of the patient in a case of emergency. If a person should be injured to the extent of rendering him unconscious, and his injuries were of such a nature as to require prompt surgical attention, a physician called to attend him would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of his life or limb, and consent on the part of the injured person would be implied. And again, if, in the course of an operation to which the patient consented, the physician should discover conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life or health of the patient, he would, though no express consent was obtained or given, be justified in extending the operation to remove and overcome them.

But such is not the case at bar. The diseased condition of plaintiff's left ear was not discovered in the course of an operation on the right which was authorized, but upon an independent examination of that organ, made after the authorized operation was found unnecessary. Nor is the evidence such as to justify the court in holding, as a matter of law, that it was such an affection as would result immediately in the serious injury of plaintiff, or such an emergency as to justify proceeding without her consent. She had experienced no particular difficulty with that ear, and the questions as to when its diseased condition would become alarming or fatal, and whether there was an immediate necessity for an operation, were, under the evidence, questions of fact for the jury.

The contention of defendant that the operation was consented to by plaintiff is not sustained by the evidence. At least, the evidence was such as to take the question to the jury. This contention is based upon the fact that she was represented on the occasion in question by her family physician; that the condition of her left ear was made known to him, and the propriety of an operation thereon suggested, to which he made no objection. It is urged that by his conduct he assented to it, and that plaintiff was bound thereby. It is not claimed that he gave his express consent. It is not disputed but that the family physician of plaintiff was present on the occasion of the operation, and at her request. But the purpose of his presence was not that

he might participate in the operation, nor does it appear that he was authorized to consent to any change in the one originally proposed to be made. Plaintiff was naturally nervous and fearful of the consequences of being placed under the influence of anæsthetics, and the presence of her family physician was requested under the impression that it would allay and calm her fears. The evidence made the question one of fact for the jury to determine.

The last contention of defendant is that the act complained of did not amount to an assault and battery. This is based upon the theory that, as plaintiff's left ear was in fact diseased, in a condition dangerous and threatening to her health, the operation was necessary, and, having been skillfully performed at a time when plaintiff had requested a like operation on the other ear, the charge of assault and battery cannot be sustained; that, in view of these conditions, and the claim that there was no negligence on the part of defendant, and an entire absence of any evidence tending to show an evil intent, the court should say, as a matter of law, that no assault and battery was committed, even though she did not consent to the operation. In other words, that the absence of a showing that defendant was actuated by a wrongful intent, or guilty of negligence, relieves the act of defendant from the charge of an unlawful assault and battery.

We are unable to reach that conclusion, though the contention is not without merit. It would seem to follow from what has been said on the other features of the case that the act of defendant amounted at least to a technical assault and battery. If the operation was performed without plaintiff's consent, and the circumstances were not such as to justify its performance without, it was wrongful; and, if it was wrongful, it was unlawful. As remarked in 1 Jaggard, Torts, 437, every person has a right to complete immunity of his person from physical interference of others, except in so far as contact may be necessary under the general doctrine of privilege; and any unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery. In the case at bar, as we have already seen, the question whether defendant's act in performing the operation upon plaintiff was authorized was a question for the jury to determine. If it was unauthorized, then it was, within what we have said, unlawful. It was a violent assault, not a mere pleasantry; and, even though no negligence is shown, it was wrongful and unlawful. The case is unlike a criminal prosecution for assault and battery, for there an unlawful intent must be shown. But that rule does not apply to a civil action, to maintain which it is sufficient to show that the assault complained of was wrongful and unlawful or the result of negligence. 1 Addison, Torts, 689; Lander *v.* Seaver, 32 Vt. 114; Vosburg *v.* Putney, 80 Wis. 523, 50 N. W. 403.

The amount of plaintiff's recovery, if she is entitled to recover at all, must depend upon the character and extent of the injury inflicted

upon her, in determining which the nature of the malady intended to be healed and the beneficial nature of the operation should be taken into consideration, as well as the good faith of the defendant.[1]

Orders affirmed.

BAKKER v. WELSH.

4 99Z+2

SUPREME COURT OF MICHIGAN, 1906.

[*Reported* 144 *Mich.* 632.]

MOORE, J. Stephen Bakker died upon the operating table at a hospital in Grand Rapids, while defendant Apted was administering to him chloroform preparatory to the removal of a tumor by the defendant Welsh. The plaintiff is the father of the deceased, and, after being appointed administrator of the estate of deceased, brought this suit, his counsel stating upon the trial that his claim was under what is known by the lawyers and the courts as the "Death Act." The trial judge directed a verdict in favor of the defendants. The case is brought here by writ of error.

Stephen Bakker was seventeen years old. He lived with his father on a farm. He was a large, healthy-appearing person. He had a tumor upon his left ear about the size of a dove's egg. Some time before his death he had received treatment, and the tumor nearly disappeared; but prior to the middle of February, 1904, it reappeared, and he came to Grand Rapids to consult some physician about it. He had an aunt about sixty years old and two adult sisters living in Grand Rapids, with whom he went to the office of the defendant Welsh, who was a specialist and had practiced medicine and surgery for a long time. After an examination he was told it would be necessary to have a microscopic examination made to determine the character of the growth, and he was sent to Dr. Williams, another specialist, who made an incision and obtained a specimen from the tumor, and young Bakker returned to his father's. On the following Saturday or Sunday he again went to the office of Dr. Welsh, accompanied by at least one of his sisters, and was informed of the report made by Dr. Williams, and was told it would be best to have the tumor removed by a surgical operation at the hospital.

The testimony is somewhat conflicting as to what was said. The sister claims Stephen objected to taking an anæsthetic, and was told there was no danger. The doctor says that he told him there was always some danger in taking an anæsthetic, but that he advised him to have the operation performed. On Tuesday afternoon Stephen, with his aunt and at least one sister, went again to the office of Dr. Welsh,

[1] See also Pratt v. Davis, 224 Ill. 300, 79 N. E. 562; Schloendorff v. Society of New York Hospital, 211 N. Y. 125, 105 N. E. 92. — ED.

and was sent from there to the hospital, where they all understood an operation should be performed the following day. In the meantime Dr. Welsh had arranged with Dr. Apted, an expert in the administration of anæsthetics, to administer the chloroform. A careful examination of the heart and lungs of the young man was made. They appeared to be normal, and in the presence of the hospital nurse and the doctors, with the usual appliances for successful operations at hand, young Bakker was put upon the table. Dr. Apted began to administer chloroform by means of the mask and drop method, and had administered about one-third of an ounce, taking from seven to ten minutes in which to do it, and Dr. Welsh was just about to commence the operation, when suddenly the heart of the patient stopped beating. Every means known to the profession was used to revive the patient, but he was already dead. The record shows the father did not know an operation was to be performed. There were two counts in the declaration. Stripped of legal verbiage, the first count stated that Stephen Bakker was a minor and it was known to the defendant Welsh he was a minor, and that it was Dr. Welsh's duty to inform the father and get his consent before entering upon this operation. The second count charges what is known as malpractice or want of skill in the operation, and that young Bakker died by reason of an improper administration of an anæsthetic. The record, instead of disclosing want of skill in the operation, shows quite the contrary. We have no hesitancy in saying the trial judge was quite right on so saying when he directed a verdict.

We then come to the question: Are defendants liable in this action because they engaged in this operation without obtaining the consent of the father? Counsel for the plaintiff are very frank with the court, and say in their brief:

"We are unable to aid the court by reference to any decisions in point. We have devoted much time and research to this interesting question, but have been unable to find any decisions of a higher court either supporting or opposing the plaintiff's contention, and we will therefore have to be content by calling the court's attention to such general reasoning as leads us to take the view herein contended for."

They then argue at length, and with a good deal of force, that, as the father is the natural guardian of the child, and is entitled to his custody and his services, he cannot be deprived of them without his consent. We quote:

"We contend that it is wrong in every sense, except in cases of emergency, for a physician and surgeon to enter upon a dangerous operation, or, as in this case, the administration of an anæsthetic, conceded to be always accompanied with danger that death may result, without the knowledge and consent of the parent or guardian. It is against public policy and the sacred rights we have in our children that surgeons should take them in charge without our knowledge ar-

to us a corpse as the first notice or intimation of their relation to the case."

On the part of defendants it is contended:

1. Consent of the father was unnecessary.
2. The lack of consent was not the cause of the boy's death, hence not actionable.
3. That if it were, the action does not survive under the death act.
4. That the action, if any, is in the father, not in the administrator.

We do not think it necessary to a disposition of the case to decide all of the defenses interposed by the defendant. The record shows a young fellow almost grown into manhood, who has been for a considerable period of time, while living with his father, afflicted with a tumor. He has attempted, while at home, to have it removed by absorption. It does disappear, but after a time it reappears. He goes up to a large city, and with an aunt and two sisters, all adults, submits to examination, receives some advice, and goes back to his father with an agreement to return later to receive the report of the expert who is to make the microscopic examination. He returns accordingly, and, with at least some of his adult relatives, arranges to have a surgical operation of a not very dangerous character performed. Preparations are made for its performance. There is nothing in the record to indicate that, if the consent of the father had been asked, it would not have been freely given. There is nothing in the record to indicate to the doctors, before entering upon the operation, that the father did not approve of his son's going with his aunt and adult sisters, and consulting a physician as to his ailment, and following his advice. We think it would be altogether too harsh a rule to say that, under the circumstances disclosed by this record, in a suit under the statute declared upon, the defendants should be held liable because they did not obtain the consent of the father to the administration of the anæsthetic.

Judgment is affirmed

McALVAY, GRANT, OSTRANDER, and HOOKER, JJ., concurred.

SECTION III.

Privilege to Act.

501 Fd 2

CAMPBELL v. RACE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1852.

[*Reported* 7 *Cush.* 408.]

THIS was an action of trespass for breaking and entering the plaintiff's close in the town of Mount Washington, and was tried in the court of common pleas, before *Byington*, J. The defendant pleaded

the general issue, and specified in defense a right of way of necessity, resulting from the impassable state of the adjoining highway, by obstructions with snow.

The defendant introduced evidence that at the time when the trespass was alleged to have been committed he was traveling with his team on a highway running east and west, which led to and intersected a highway running north and south, which latter highway led to and intersected another highway, on which the defendant had occasion to go with his team; and the usual, proper, and only mode of getting on which, by a highway, was by passing over the two highways first named, when they were in a condition fit for travel; but at the time of the alleged trespass, they were both obstructed, and rendered impassable by snow-drifts; because of which obstructions, the defendant turned out of the first highway with his team, at a place where it was rendered impassable as aforesaid, and passed over the adjoining fields of the plaintiff, doing no unnecessary damage, and returned into the second highway, as soon as he had passed the obstructions which rendered both impassable. And he contended, that the highways being thus rendered impassable, he had a way of necessity over the plaintiff's adjoining fields, or that his so passing was excusable, and not a trespass.

But the judge ruled, that these facts constituted no defense to the action; and a verdict having been returned accordingly for the plaintiff, the defendant alleged exceptions.

BIGELOW, J. It is not controverted by the counsel for the plaintiff, that the rule of law is well settled in England, that where a highway becomes obstructed and impassable from temporary causes, a traveler has a right to go *extra viam* upon adjoining lands, without being guilty of trespass. The rule is so laid down in the elementary books. 2 Bl. Com., 36; Woolrych on Ways, 50, 51; 3 Cruise Dig., 89; Wellbeloved on Ways, 38; and it is fully supported by the adjudged cases. Henn's Case, W. Jones, 296; 3 Salk., 182; 1 Saund., 323, note 3; Absor *v.* French, 2 Show. 28; Young *v.* ———, 1 Ld. Raym. 725; Taylor *v.* Whitehead, 2 Doug. 745; Bullard *v.* Harrison, 4 M. & S. 387, 393. Such being the admitted rule of law, as settled by the English authorities, it was urged in behalf of the plaintiff in the present case, that it had never been recognized or sustained by American authors or cases. But we do not find such to be the fact. On the contrary, Mr. Dane, whose great learning and familiar acquaintance with the principles of the common law, and their practical application at an early period in this commonwealth, entitle his opinion to very great weight, adopts the rule, as declared in the leading case of Taylor *v.* Whitehead, *ubi supra*, which he says "is the latest on the point, and *settles the law.*" 3 Dane Ab., 258. And so Chancellor Kent states the rule. 3 Kent Com., 424. We are not aware of any case in which the question has been distinctly raised and adjudicated in this country; but there are several decisions in New York, in which the rule has been incidentally recog-

nized and treated as well-settled law. Holmes v. Seely, 19 Wend. 507; Williams v. Safford, 7 Barb. 309; Newkirk v. Sabler, 9 Barb. 652, These authorities would seem to be quite sufficient to justify us in the recognition of the rule. But the rule itself is founded on the established principles of the common law, and is in accordance with the fixed and uniform usage of the community. Indeed, one of the strongest arguments in support of it is, that it has always been practiced upon and acquiesced in, without objection, throughout the New England States. This accounts satisfactorily for the absence of any adjudication upon the question, in our courts, and is a sufficient answer to the objection upon this ground, which was urged upon us by the learned counsel for the plaintiff. When a right has been long claimed and exercised, without denial or objection, a strong presumption is raised, that the right is well founded.

The plaintiff's counsel is under a misapprehension in supposing that the authorities in support of the rule rest upon any peculiar or exceptional principle of law. They are based upon the familiar and well-settled doctrine, that to justify or excuse an alleged trespass, inevitable necessity or accident must be shown. If a traveler in a highway, by unexpected and unforeseen occurrences, such as a sudden flood, heavy drifts of snow, or the falling of a tree, is shut out from the traveled paths, so that he cannot reach his destination, without passing upon adjacent lands, he is certainly under a necessity so to do. It is essential to the act to be done, without which it cannot be accomplished. Serious inconveniences, to say the least, would follow, especially in a climate like our own, if this right were denied to those who have occasion to pass over the public ways. Not only would intercourse and business be sometimes suspended, but life itself would be endangered. In hilly and mountainous regions, as well as in exposed places near the sea coast, severe and unforeseen storms not unfrequently overtake the traveler, and render highways suddenly impassable, so that to advance or retreat by the ordinary path, is alike impossible. In such cases, the only escape is, by turning out of the usually traveled way, and seeking an outlet over the fields adjoining the highway. If a necessity is not created, under such circumstances, sufficient to justify or excuse a traveler, it is difficult to imagine a case which would come within the admitted rule of law. To hold a party guilty of a wrongful invasion of another's rights, for passing over land adjacent to the highway, under the pressure of such a necessity, would be pushing individual rights of property to an unreasonable extent, and giving them a protection beyond that which finds a sanction in the rules of law. Such a temporary and unavoidable use of private property, must be regarded as one of those incidental burdens to which all property in a civilized community is subject. In fact, the rule is sometimes justified upon the ground of public convenience and necessity. Highways being established for public service, and for the use and benefit of the whole com-

munity, a due regard for the welfare of all requires, that when temporarily obstructed, the right of travel should not be interrupted. In the words of Lord Mansfield, "it is for the general good that people should be entitled to pass in another line." It is a maxim of the common law, that where public convenience and necessity come in conflict with private right, the latter must yield to the former. A person traveling on a highway, is in the exercise of a public, and not a private right. If he is compelled, by impassable obstructions, to leave the way, and go upon adjoining lands, he is still in the exercise of the same right. The rule does not, therefore, violate the principle that individual convenience must always be held subordinate to private rights, but clearly falls within that maxim, which makes public convenience and necessity paramount.

It was urged in argument that the effect of establishing this rule of law would be to appropriate private property to public use without providing any means of compensation to the owner. If such an accidental, occasional, and temporary use of land can be regarded as an appropriation of private property to a public use, entitling the owner to compensation, which may well be doubted, still the decisive answer to this objection is quite obvious. The right to go *extra viam*, in case of temporary and impassable obstructions, being one of the legal incidents or consequences which attaches to a highway through private property, it must be assumed, that the right to the use of land adjoining the road was taken into consideration and proper allowance made therefor, when the land was originally appropriated for the highway, and that the damages were then estimated and fixed, for the private injury which might thereby be occasioned.

It was also suggested, that the statutes of the commonwealth, imposing the duty on towns to keep public ways in repair, and rendering them liable for damages occasioned by defects therein, furnish ample remedies in cases of obstructions, and do away with the necessity of establishing the rule of the common law in this commonwealth, which gives the right in such cases to pass over adjacent lands. But this is not so. Towns are not liable for damages in those cases to which this rule of the common law would most frequently be applicable — of obstructions, occasioned by sudden and recent causes, which have not existed for the space of twenty-four hours, and of which the towns have had no notice. Besides, the statute liability of towns does not extend to damages such as would ordinarily arise from the total obstruction of a highway, being expressly confined to cases of bodily injuries and damages to property. St. 1850, c. 5; Canning *v.* Williamstown, 1 Cush. 451; Harwood *v.* Lowell, 4 Cush. 310; Brailey *v.* Southborough, 6 Cush. 141.

From what has already been said, the limitations and restrictions of the right to go upon adjacent lands in case of obstructions in the highway can be readily inferred. Having its origin in necessity, it must

be limited by that necessity; *cessante ratione, cessat ipsa lex.* Such a right is not to be exercised from convenience merely, nor when, by the exercise of due care, after notice of obstructions, other ways may be selected and the obstructions avoided. But it is to be confined to those cases of inevitable necessity or unavoidable accident, arising from sudden and recent causes which have occasioned temporary and impassable obstructions in the highway. What shall constitute such inevitable necessity or unavoidable accident, must depend upon the various circumstances attending each particular case. The nature of the obstruction in the road, the length of time during which it has existed, the vicinity or distance of other public ways, the exigencies of the traveler, are some of the many considerations which would enter into the inquiry, and upon which it is the exclusive province of the jury to pass, in order to determine whether any necessity really existed, which would justify or excuse the traveler. In the case at bar, this question was wholly withdrawn from the consideration of the jury, by the ruling of the court. It will therefore be necessary to send the case to a new trial in the court of common pleas.

Exceptions sustained

5-03-242

BACON, MAXIMS, reg. 5. If a man steal viands to satisfy his present hunger, this is no felony nor larceny. So if divers be in danger of drowning by the casting away of some boat or bark, and one of them get to some plank, or on the boat side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned, this is neither *se defendendo* nor by misadventure, but justifiable. So if divers felons be in a gaol, and the gaol by casualty is set on fire, whereby the prisoners get forth, this is no escape, nor breaking of prison. So upon the statute that every merchant that setteth his merchandise on land without satisfying the customer or agreeing for it (which agreement is construed to be in certainty), shall forfeit his merchandise; and it is so that by tempest a great quantity of the merchandise is cast overboard, whereby the merchant agrees with the customer by estimation, which falleth out short of the truth; yet the over quantity is not forfeited, by reason of the necessity; where note that necessity dispenseth with the direct letter of a statute law.

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REGINA v. DUDLEY.

QUEEN'S BENCH DIVISION. 1884.

[*Reported* 15 *Cox C. C.* 624, 14 *Q. B. D.* 273.]

LORD COLERIDGE, C. J.[1] The two prisoners, Thomas Dudley and Edwin Stephens, were indicted for the murder of Richard Parker on the high seas on the 25th day of July in the present year. They were tried before my brother Huddleston at Exeter on the 6th day of November, and under the direction of my learned brother, the jury returned a special verdict, the legal effect of which has been argued before us, and on which we are now to pronounce judgment. The special verdict is as follows. [*The learned judge read the special verdict.*] From these facts, stated with the cold precision of a special verdict, it appears sufficiently that the prisoners were subject to terrible temptation and to sufferings which might break down the bodily power of the strongest man and try the conscience of the best. Other details yet more harrowing, facts still more loathsome and appalling, were presented to the jury, and are to be found recorded in my learned brother's notes; but nevertheless this is clear, — that the prisoners put to death a weak and unoffending boy upon the chance of preserving their own lives by feeding upon his flesh and blood after he was killed, and with a certainty of depriving him of any possible chance of survival. The verdict finds in terms that "if the men had not fed upon the body of the boy, they would probably not have survived," and that "the boy, being in a much weaker condition, was likely to have died before them." They might possibly have been picked up next day by a passing ship; they might possibly not have been picked up at all; in either case it is obvious that the killing of the boy would have been an unnecessary and profitless act. It is found by the verdict that the boy was incapable of resistance, and, in fact, made none; and it is not even suggested that his death was due to any violence on his part attempted against, or even so much as feared by, them who killed him. Under these circumstances the jury say they are ignorant whether those who killed him were guilty of murder, and have referred it to this court to say what is the legal consequence which follows from the facts which they have found. There remains to be considered the real question in the case, whether killing, under the circumstances set forth in the verdict, be or be not murder. The contention that it could be anything else was to the minds of us all both new and strange; and we stopped the Attorney-General in his negative argument that we might hear what could be said in support of a proposition which appeared to us to be at once dangerous, immoral, and opposed to all legal principle and analogy. All, no doubt, that can

[1] Part of the opinion only is given.

be said has been urged before us, and we are now to consider and determine what it amounts to. First, it is said that it follows, from various definitions of murder in books of authority — which definitions imply, if they do not state, the doctrine — that, in order to save your own life you may lawfully take away the life of another, when that other is neither attempting nor threatening yours, nor is guilty of any illegal act whatever towards you or any one else. But if these definitions be looked at, they will not be found to sustain the contention. The earliest in point of date is the passage cited to us from Bracton, who wrote in the reign of Henry III. It was at one time the fashion to discredit Bracton, as Mr. Reeves tells us, because he was supposed to mingle too much of the canonist and civilian with the common lawyer. There is now no such feeling; but the passage upon homicide, on which reliance is placed, is a remarkable example of the kind of writing which may explain it. Sin and crime are spoken of as apparently equally illegal; and the crime of murder, it is expressly declared, may be committed *lingua vel facto;* so that a man like Hero, "done to death by slanderous tongues," would, it seems, in the opinion of Bracton, be a person in respect of whom might be grounded a legal indictment for murder. But in the very passage as to necessity on which reliance has been placed, it is clear that Bracton is speaking of necessity in the ordinary sense, — the repelling by violence, violence justified so far as it was necessary for the object, any illegal violence used towards one's self. If, says Bracton (Lib. iii. Art. De Corona, cap. 4, fol. 120), the necessity be *evitabilis et evadere posset absque occisione, tunc erit reus homicidii*, — words which show clearly that he is thinking of physical danger, from which escape may be possible, and that *inevitabilis necessitas*, of which he speaks as justifying homicide, is a necessity of the same nature. It is, if possible, yet clearer that the doctrine contended for receives no support from the great authority of Lord Hale. It is plain that in his view the necessity which justifies homicide is that only which has always been, and is now, considered a justification. "In all these cases of homicide by necessity," says he, "as in pursuit of a felon, in killing him that assaults to rob, or comes to burn or break a house, or the like, which are in themselves no felony" (1 Hale P. C. 491). Again, he says that the necessity which justifies homicide is of two kinds: "(1) That necessity which is of a private nature; (2) That necessity which relates to the public justice and safety. The former is that necessity which obligeth a man to his own defence and safeguard; and this takes in these inquiries: (1) What may be done for the safeguard of a man's own life," — and then follow three other heads not necessary to pursue. Then Lord Hale proceeds: "(1) As touching the first of these, namely, homicide in defence of a man's own life, which is usually styled *se defendendo*" (1 Hale P. C. 478). It is not possible to use words more clear to show that Lord Hale regarded the private necessity which justified, and alone justified, the taking the life of another

for the safeguard of one's own to be what is commonly called self-defence. But if this could be even doubtful upon Lord Hale's words, Lord Hale himself has made it clear; for in the chapter in which he deals with the exemption created by compulsion or necessity, he thus expresses himself: "If a man be desperately assaulted and in peril of death and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder if he commit the fact, for he ought rather to die himself than to kill an innocent; but if he cannot otherwise save his own life, the law permits him in his own defence to kill the assailant, for, by the violence of the assault and the offence committed upon him by the assailant himself, the law of nature and necessity hath made him his own *protector cum debito moderamine inculpatæ tutelæ* (1 Hale P. C. 51). But, further still: Lord Hale in the following chapter deals with the position asserted by the casuists and sanctioned, as he says, by Grotius and Puffendorf, that in a case of extreme necessity, either of hunger or clothing, "theft is no theft, or at least not punishable as theft; and some even of our own lawyers have asserted the same;" "but," says Lord Hale, "I take it that here in England that rule, at least by the laws of England, is false; and therefore if a person, being under necessity for want of victuals or clothes, shall upon that account clandestinely and *animo furandi* steal another man's goods, it is a felony and a crime by the laws of England punishable with death" (1 Hale P. C. 54). If therefore Lord Hale is clear, as he is, that extreme necessity of hunger does not justify larceny, what would he have said to the doctrine that it justified murder? It is satisfactory to find that another great authority, second probably only to Lord Hale, speaks with the same unhesitating clearness on this matter. Sir Michael Foster, in the third chapter of his "Discourse on Homicide," deals with the subject of Homicide Founded in Necessity; and the whole chapter implies, and is insensible unless it does imply, that in the view of Sir Michael Foster, necessity and self-defence (which in section 1 he defines as "opposing force to force even to the death") are convertible terms. There is no hint, no trace of the doctrine now contended for; the whole reasoning of the chapter is entirely inconsistent with it.

In East (1 East P. C. 271), the whole chapter on Homicide by Necessity is taken up with an elaborate discussion of the limits within which necessity — in Sir Michael Foster's sense (given above) — of self-defence is a justification of or excuse for homicide. There is a short section at the end (p. 294) very generally and very doubtfully expressed, in which the only instance discussed is the well-known one of two shipwrecked men on a plank able to sustain only one of them; and the conclusion is left by Sir Edward East entirely undetermined. What is true of Sir Edward East is true also of Mr. Serjeant Hawkins. The whole of his chapter on Justifiable Homicide assumes that

the only justifiable homicide of a private nature is in defence against force of a man's person, house, or goods. In the 26th section we find again the case of the two shipwrecked men and the single plank, with this significant expression from a careful writer: "It is said to be justifiable." So, too, Dalton, c. 150, clearly considers necessity and self-defence, in Sir Michael Foster's sense of that expression, to be convertible terms, — though he prints without comment Lord Bacon's instance of the two men on one plank as a quotation from Lord Bacon, adding nothing whatever to it of his own; and there is a remarkable passage at page 339, in which he says that even in the case of a murderous assault upon a man, yet before he may take the life of the man who assaults him, even in self-defence, *cuncta prius tentanda.* The passage in Staundforde, on which almost the whole of the dicta we have been considering are built, when it comes to be examined, does not warrant the conclusion which has been derived from it. The necessity to justify homicide must be, he says, inevitable; and the example which he gives to illustrate his meaning is the very same which has just been cited from Dalton, showing that the necessity he was speaking of was a physical necessity and the self-defence a defence against physical violence. Russell merely repeats the language of the old text-books and adds no new authority nor any fresh considerations.

Is there, then, any authority for the proposition which has been presented to us? Decided cases there are none. The case of the seven English sailors referred to by the commentator on Grotius and by Puffendorf has been discovered by a gentleman of the Bar — who communicated with my brother Huddleston — to convey the authority, if it conveys so much, of a single judge of the island of St. Kitts, when that island was possessed partly by France and partly by this country, somewhere about the year 1641. It is mentioned in a medical treatise published at Amsterdam, and is altogether, as authority in an English court, as unsatisfactory as possible. The American case cited by my brother Stephen in his digest from Wharton on Homicide, page 237, in which it was decided, correctly, indeed, that sailors had no right to throw passengers overboard to save themselves, but on the somewhat strange ground that the proper mode of determining who was to be sacrificed was to vote upon the subject by ballot, can hardly, as my brother Stephen says, be an authority satisfactory to a court in this country.[1] The observations of Lord Mansfield in the

[1] "The case does not become 'a case of necessity' unless all ordinary means of self-preservation have been exhausted. The peril must be instant, overwhelming; leaving no alternative but to lose our own life, or to take the life of another person. . . . For example: suppose that two persons who owe no duty to one another that is not mutual should, by accident not attributable to either, be placed in a situation where both cannot survive. Neither is bound to save the other's life by sacrificing his own; nor would either commit a crime in saving his own life in a struggle for the only means of safety. But in applying this law, we must look not only to the jeopardy in which the parties are, but also to the relations in which they stand. The slayer must be under no obligation to make his own safety secondary to the safety of others. . . .

case of Rex *v.* Stratton and others (21 St. Tr. 1045), striking and excellent as they are, were delivered in a political trial, where the question was whether a political necessity had arisen for deposing a governor of Madras. But they have little application to the case before us, which must be decided on very different considerations.[1]

The one real authority of former times is Lord Bacon, who in his commentary on the maxim, *Necessitas inducit privilegium quoad jura privata*, lays down the law as follows: "Necessity carrieth a privilege in itself. Necessity is of three sorts, — necessity of conservation of life, necessity of obedience, and necessity of the act of God or of a stranger. First, of conservation of life. If a man steals viands to satisfy his present hunger, this is no felony nor larceny. So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side, to keep himself above water, and another to save his life thrust him from it, whereby he is drowned, this is neither *se defendendo* nor by misadventure, but justifiable." On this it is to be observed that Lord Bacon's proposition that stealing to satisfy hunger is no larceny is hardly supported by Staundforde, whom he cites for it, and is expressly contradicted by Lord Hale in the passage already cited. And for the proposition as to the plank or boat, it is said to be derived from the canonists; at any rate he cites no authority for it, and it must stand upon his own. Lord Bacon was great even as a lawyer; but it is permissible to much smaller men, relying upon principle and on the authority of others the equals and even the superiors of Lord Bacon as lawyers, to question the soundness of his dictum. There

The passenger stands in a position different from that of the officers and seamen; it is the sailor who must encounter the hardships and perils of the voyage. . . . The captain, indeed, and a sufficient number of seamen to navigate the boat, must be preserved. . . . This rule may be deemed a harsh one towards the sailor, who may thus far have done his duty; but when the danger is so extreme that the only hope is in sacrificing either a sailor or a passenger, any alternative is hard; and would it not be the hardest of any, to sacrifice a passenger in order to save a supernumerary sailor? . . . When the ship is in no danger of sinking, but all sustenance is exhausted, and a sacrifice of one person is necessary to appease the hunger of others, the selection is by lot. This mode is resorted to as the fairest mode; and, in some sort, as an appeal to God for the selection of the victim." — BALDWIN, J. (to the jury) in United States *v.* Holmes, 1 Wall. Jun. 1, 22.

[1] "Wherever necessity forces a man to do an illegal act, *forces* him to do it, it justifies him, because no man can be guilty of a crime without the will and intention of his mind. It must be voluntary; therefore a madman cannot commit a crime. A man who is absolutely by natural necessity forced, his will does not go along with the act; and therefore in the case of natural necessity (and, by the by, whenever a question turns upon natural necessity it is a question to be determined by a jury, and by a jury only; it is a question upon fact and the degree of fact) if a man is forced to commit acts of high treason, if it appears really force, and such as human nature could not be expected to resist, and the jury are of that opinion, the man is not then guilty of high treason. In a case of homicide, if a man was attacked, and in danger, and so on in a variety of instances, natural necessity certainly justifies." — LORD MANSFIELD (to the jury) in Rex *v.* Stratton, 21 How. St. Tr. 1045, 1223.

are many conceivable states of things in which it might possibly be true; but if Lord Bacon meant to lay down the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbor, it certainly is not law at the present day. There remains the authority of my brother Stephen, who both in his Digest (Art. 32) and in his "History of the Criminal Law" (vol. ii. p. 108), uses language perhaps wide enough to cover this case. The language is somewhat vague in both places, but it does not in either place cover this case of necessity, and we have the best authority for saying that it was not meant to cover it. If it had been necessary, we must with true deference have differed from him; but it is satisfactory to know that we have, probably at least, arrived at no conclusion in which, if he had been a member of the court, he would have been unable to agree. Neither are we in conflict with any opinion expressed upon this subject by the learned persons who formed the Commission for preparing the Criminal Code. They say on this subject: "We are not prepared to suggest that necessity should in every case be a justification; we are equally unprepared to suggest that necessity should in no case be a defence. We judge it better to leave such questions to be dealt with when, if ever, they arise in practice, by applying the principles of law to the circumstances of the particular case." It would have been satisfactory to us if these eminent persons could have told us whether the received definitions of legal necessity were in their judgment correct and exhaustive, and, if not, in what way they should be amended; but as it is we have, as they say, "to apply the principles of law to the circumstances of this particular case." Now, except for the purpose of testing how far the conservation of a man's own life is in all cases and under all circumstances an absolute, unqualified, and paramount duty, we exclude from our consideration all the incidents of war. We are dealing with a case of private homicide, not one imposed upon men in the service of their sovereign or in the defence of their country. Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognized excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called necessity. But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and though many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence, and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is, generally speaking, a duty; but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and

children, as in the noble case of the "Birkenhead," — these duties impose on men the moral necessity, not of the preservation, but of the sacrifice, of their lives for others, from which in no country — least of all, it is to be hoped, in England — will men ever shrink, as indeed they have not shrunk. It is not correct, therefore, to say that there is any absolute and unqualified necessity to preserve one's life. "*Necesse est ut eam, non ut vivam*," is a saying of a Roman officer quoted by Lord Bacon himself with high eulogy in the very chapter on Necessity to which so much reference has been made. It would be a very easy and cheap display of commonplace learning to quote from Greek and Latin authors, — from Horace, from Juvenal, from Cicero, from Euripides, — passage after passage in which the duty of dying for others has been laid down in glowing and emphatic language as resulting from the principles of heathen ethics. It is enough in a Christian country to remind ourselves of the Great Example which we profess to follow. It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting was chosen. Was it more necessary to kill him than one of the grown men? The answer must be, No.

> "So spake the Fiend; and with necessity,
> The tyrant's plea, excused his devilish deeds."

It is not suggested that in this particular case the "deeds" were "devilish;" but it is quite plain that such a principle, once admitted, might be made the legal cloak for unbridled passion and atrocious crime. There is no path safe for judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment, and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has entrusted to the hands fittest to dispense it. It must not be supposed that, in refusing to admit temptation to be an excuse for crime, it is forgotten how terrible the temptation was, how awful the suffering, how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is therefore our duty to declare that the prisoners' act in this case was wilful murder; that the facts as stated in the verdict are no legal justification of the homicide. *Judgment for the Crown.*

513 Z42

REX v. CRUTCHLEY.

BERKSHIRE ASSIZES. 1831.

[*Reported* 5 *Carrington & Payne*, 1833.]

INDICTMENT on the stat. 7 & 8 Geo. 4, c. 30, s. 4, for destroying a threshing machine, the property of a person named Austin. There were other counts for damaging it with intent to destroy it, and for damaging it with intent to render it useless.

It appeared that, about ten o'clock in the night of the 22d of November, 1830, a mob came to the farm of Mr. Austin, and broke his threshing machine to pieces. It was proved that the prisoner was with this mob, and that he gave the threshing machine a blow with a sledge-hammer.

Mr. Justice PATTESON allowed the witnesses for the prosecution to be asked, in cross-examination, whether many persons had not been compelled to join this mob against their will, and whether the mob did not compel each person to give one blow to each threshing machine that they broke.

For the defence William Davis was called. He was the gamekeeper of Mrs. Bainbridge, in whose service the prisoner was an under-keeper. He stated that, being on the watch at Mrs. Bainbridge's preserves, the mob laid hold of himself and the prisoner, and compelled both to go with them for the purpose of breaking threshing machines.

Mr. Justice PATTESON allowed the witness to state that, before the prisoner and himself had gone many yards with the mob, they agreed to run away from the mob the first opportunity.

The witness stated that he ran away from the mob in about ten minutes, and that the prisoner joined him in about a quarter of an hour after that time, and that they then returned to their watching at the preserves.

Verdict, Not guilty.[1]

[1] "With regard to the argument you have heard, that these prisoners were induced to join Thom, and to continue with him from a fear of personal violence to themselves, I am bound to tell you, that where parties for such a reason are induced to join a mischievous man, it is not their fear of violence to themselves which can excuse their conduct to others. You probably, gentlemen, never saw two men tried at a criminal bar for an offence which they had jointly committed, where one of them had not been to a certain extent in fear of the other, and had not been influenced by that fear in the conduct he pursued; yet that circumstance has never been received by the law as an excuse for his crime, and the law is, that no man, from a fear of consequences to himself, has a right to make himself a party to committing mischief on mankind." LORD DENMAN, C. J., in Reg. v. Tyler, 8 C. & P. 616. — ED.

514(1)772

RESPUBLICA v. McCARTY.

SUPREME COURT OF PENNSYLVANIA. 1781.

[*Reported* 2 *Dallas*, 86.]

McKEAN, C. J.[1] The crime imputed to the defendant by the indictment is that of levying war, by joining the armies of the King of Great Britain. Enlisting, or procuring any person to be enlisted, in the service of the enemy, is clearly an act of treason. By the defendant's own confession it appears that he actually enlisted in a corps belonging to the enemy; but it also appears that he had previously been taken prisoner by them, and confined at Wilmington. He remained, however, with the British troops for ten or eleven months, during which he might easily have accomplished his escape, and it must be remembered that in the eye of the law nothing will excuse the act of joining an enemy but the fear of immediate death; not the fear of any inferior personal injury, nor the apprehension of any outrage upon property. But had the defendant enlisted merely from the fear of famishing, and with a sincere intention to make his escape, the fear could not surely always continue, nor could his intention remain unexecuted for so long a period.

514(2)772

ARP v. STATE.

SUPREME COURT OF ALABAMA. 1893.

[*Reported* 97 *Ala.* 5.]

COLEMAN, J.[2] . . . The court was asked to give the following charge: "If the jury believe from the evidence that the defendant killed Pogue under duress, under compulsion from a necessity, under threats of immediate impending peril to his own life, such as to take away the free agency of the defendant, then he is not guilty." The court refused this charge, and the refusal is assigned as error. This brings up for consideration the question, what is the law when one person, under compulsion or fear of great bodily harm to himself, takes the life of an innocent person; and what is his duty when placed under such circumstances?

The fact that defendant had been in the employment of Burkhalter is no excuse. The command of a superior to an inferior, of a parent

[1] To the jury only so much of the charge is given as deals with the question of compulsion. — ED.

[2] Only so much of the opinion as discusses the question of compulsion is given. — ED.

to a child, of a master to a servant, or of a principal to his agent, will not justify a criminal act done in pursuance of such command. 1 Bishop, § 355; Reese v. State, 73 Ala. 18; 4 Blackstone, § 27.

In a learned discussion of the question, to be found in Leading Criminal Cases, vol. i, p. 81, and note on p. 85, by Bennett and Heard, it is declared that "for certain crimes the wife is responsible, although committed under the compulsion of her husband. Such are murder," etc. To the same effect is the text in 14 Am. & Eng. Encyc. of Law, p. 649; and this court gave sanction to this rule in Bibb v. State, 94 Ala. 31; 10 So. Rep. 506. In Ohio a contrary rule prevails in regard to the wife. Davis v. State, 15 Ohio, 72; 45 Amer. Dec. 559. In Arkansas there is a statute specially exempting married women from liability, when "acting under the threats, commands, or coercion of their husbands;" but it was held under this act there was no presumption in favor of the wife accused of murder, and that it was incumbent on her to show that the crime was done under the influence of such coercion, threats, or commands. Edwards v. State, 27 Ark. 493, reported in 1 Criminal Law, by Green, p. 741.

In the case of Beal v. The State of Georgia, 72 Ga. Rep. 200, and also in the case of The People v. Miller, 66 Cal. 468, the question arose upon the sufficiency of the testimony of a witness to authorize a conviction for a felony, it being contended that the witness was an accomplice. In both cases the witness was under fourteen years of age. It was held that if the witness acted under threats and compulsion, he was not an accomplice. The defendants were convicted in both cases.

In the case of Rex v. Crutchley, 5 C. & P. 133, the defendant was indicted for breaking a threshing machine. The defendant was allowed to prove that he was compelled by a mob to go with them and compelled to hammer the threshing machine, and was also permitted to prove that he ran away at the first opportunity.

In Hawkins' Pleas of the Crown, vol. i, c. 28, § 26, it is said: "The killing of an innocent person in defence of a man's self is said to be justifiable in some special cases, as if two be shipwrecked together, and one of them get upon a plank to save himself, and the other also, having no other means to save his life, get upon the same plank, and finding it not able to support them both, thrusts the other from it, whereby he is drowned, it seems that he who thus preserved his own life at the expense of that other may justify the fact by the inevitable necessity of the case."

In 1 Hale's Pleas of the Crown, c. vii, § 50, it is said: "There is to be observed a difference between the times of war, or public insurrection or rebellion, when a person is under so great a power that he cannot resist or avoid, the law in some cases allows an impunity for parties compelled, or drawn by fear of death, to do some acts in themselves capital, which admit no excuse in time of peace. . . . Now as to times of peace, if a man be menaced with death unless he will commit an act of treason, murder, or robbery, the fear of death doth not

excuse him if he commit the act; for the law hath provided a sufficient remedy against such fears by applying himself to the court and officers of justice for a writ or precept *de securitate pacis*. Again, if a man be desperately assaulted, and in peril of death, and cannot otherwise escape unless to satisfy his assailant's fury he will kill an innocent person, the present fear of actual force will not acquit him of the crime and punishment of murder, if he commit the act, for he ought rather to die himself than kill an innocent; but if he cannot otherwise save his own life, the law permits him in his own defence to kill his assailant."

Blackstone, vol. 4, § 30, declares the law to be, "Though a man be violently assaulted, and has not other possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder; for he ought rather to die himself than escape by the murder of an innocent."

In Stephen's Commentaries, vol. 4, book 6, c. 2, pp. 83–84, the same rule is declared to be the law.

In East's Crown Law, the same general principles are declared as to cases of treason and rebellion, etc. But on page 294, after referring to the case of two persons being shipwrecked and getting on the same plank, proceeds as follows: "Yet, according to Lord Hale, a man cannot even excuse the killing of another who is innocent, under a threat, however urgent, of losing his own life unless he comply. But if the commission of treason may be extenuated by the fear of present death, and while the party is under actual compulsion, there seems no reason why this offence may not be mitigated upon the like consideration of human infirmity. But if the party might, as Lord Hale in one place supposes, have recourse to the law for his protection against such threats, it will certainly be no excuse for committing murder."

In Russell on Crimes, vol. 1, § 699, it is stated as follows: "The person committing the crime must be a free agent, and not subject to actual force at the time the act is done; thus, if A by force take the arm of B, in which is a weapon, and therewith kill C, A is guilty of murder, but not B. But if it be only a moral force put upon B, as by threatening him with duress or imprisonment, or even by an assault to the peril of his life, in order to compel him to kill C, it is no legal excuse."

In the case of Regina *v.* Tyler, reported in 8 Car. & Payne, 618, Lord Denman, C. J., declares the law as follows: "With regard to the argument you have heard, that these prisoners were induced to join Thom, and to continue with him from a fear of personal violence to themselves, I am bound to tell you that where parties for such reason are induced to join a mischievous man, it is not their fear of violence to themselves which can excuse their conduct to others. . . . The law is that no man, from a fear of consequences to himself, has a right to make himself a party to committing mischief on mankind."

In the case of Respublica *v.* McCarty, 2 Dallas, 86, when the de-

fendant was on trial for high treason, the court uses this language: "It must be remembered that, in the eye of the law, nothing will excuse the act of joining the enemy but the fear of immediate death; not the fear of any inferior personal injury, nor the apprehension of any outrage on property."

The same rule in regard to persons charged with treason as that stated in Hale's Pleas of the Crown is declared in Hawkins, vol. 1, c. 17, § 28 and note, and both authors hold that "the question of the practicability of escape is to be considered, and that if the person thus acting under compulsion continued in the treasonable acts longer than was necessary, the defence '*pro timore mortis*' will not be available."

This principle finds further support in the case of U. S. *v.* Greiner, tried for treason, reported in 4 Phil. 396, in the following language: "The only force which excuses on the grounds of compulsion is force upon the person and present fear of death, which force and fear must continue during all the time of military service, and that it is incumbent in such a case upon him who makes force his defence to show an actual force, and that he quitted the service as soon as he could."

Wharton's Criminal Law, vol. 1, § 94, under the head of Persons under Compulsion, says: "Compulsion may be viewed in two aspects: 1. When the immediate agent is physically forced to do the injury, as when his hand is seized by a person of superior strength, and is used against his will to strike a blow, in which case no guilt attaches to the person so coerced. 2. When the force applied is that of authority or fear. Thus, when a person not intending wrong is swept along by a party of persons whom he cannot resist, he is not responsible, if he is compelled to do wrong by threats on the part of the offenders instantly to kill him, or to do him grievous bodily harm if he refuses; but threats of future injury, or the command of any one not the husband of the offender, do not excuse any offence. Thus, it is a defence to an indictment for treason that the defendant was acting in obedience to a *de facto* government, or to such concurring and overbearing sense of the community in which he resided as to imperil his life in case of dissent." In section 1803 a, of the same author (Wharton), it is said: "No matter what may be the shape compulsion takes, if it affects the person and he yielded to it *bona fide*, it is a legitimate defence."

We have examined the cases cited by Mr. Wharton to sustain the text, and find them to be cases of treason, or fear from the party slain, and in none of them is there a rule different from that declared in the common law authorities cited by us.

Bishop on Criminal Law, §§ 346, 347, 348, treats of the rules of law applicable to acts done under necessity and compulsion. It is here declared: "That always an act done from compulsion and necessity is not a crime. To this proposition the law knows no exception. Whatever it is necessary for a man to do to save his life, is, in general, to be considered as compelled."

The cases cited to these propositions show the facts to be different from those under consideration. The case referred in 1 Plow. 19, was where the defendant had thrown overboard a part of his cargo of green wood during a severe tempest to save his vessel and the remainder of his cargo. The other, 5 Q. B. 279, was for the failure to keep up a highway, which the encroachments of the sea had made impossible; and that of Tate *v.* The State, 5 Black. 73, was also that of a supervisor of a public highway, and the others were cases of treason, to which reference has been made. In section 848, the author cites the rule laid down by Russell, and also of Lord Denman, and in 1 East P. C., to which reference has already been made. In section 845, the same author uses the following language: "The cases in which a man is clearly justified in taking another's life to save his own are when the other has voluntarily placed himself in the wrong. And *probably*, as we have seen, it is never the right of one to deprive an innocent third person of life for the preservation of his own. There are, it *would seem*, circumstances in which one is bound even to die for another." Italics are ours, — emphasized to call attention to the fact that the author is careful to content himself more with a reference to the authorities which declare these principles of law than an adoption of them as his own.

The authorities seem to be conclusive that, at common law, no man can excuse himself, under the plea of necessity or compulsion, for taking the life of an innocent person.

Our statute has divided murder into two degrees, and affixed the punishment for each degree, but in no respect has added to or taken away any of the ingredients of murder as known at common law. Mitchell *v.* State, 60 Ala. 26; Fields *v.* State, 52 Ala. 352.

That persons have exposed themselves to imminent peril and death for their fellow man, and that there are instances where innocent persons have submitted to murderous assaults and death rather than take life is well established, but such self-sacrifices emanated from other motives than the fear of legal punishment. That the fear of punishment by imprisonment or death at some future day by due process of law can operate with greater force to restrain or deter from its violation, than the fear of immediate death unlawfully inflicted, is hardly reconcilable with our knowledge and experience with that class of mankind who are controlled by no other higher principle than fear of the law. Be this as it may, there are other principles of law undoubtedly applicable to the facts of this case, and which we think cannot be ignored.

The evidence of the defendant himself shows that he went to Burkhalter's house about nine o'clock of the night of the killing, and there met Burkhalter and Leith, and that it was there, and at that time, they told him he must kill Pogue. The evidence is not clear as to how far it was from Burkhalter's to Pogue's dwelling, where the crime was perpetrated; but it was sufficient to show that there was some considerable distance between the places, and he testifies as they went to Pogue's, they went by the mill and got the axe with which he killed him. Under

every principle of law, it was the duty of the defendant to have escaped from Burkhalter and Leith, after being informed of their intention to compel him to take the life of Pogue, as much so as it is the duty of one who had been compelled to take up arms against his own government, if he can do so with reasonable safety to himself; or of one assailed, to retreat before taking the life of his assailant. Although it may have been true that at the time he struck the fatal blow he had reason to believe he would be killed by Burkhalter and Leith unless he killed Pogue, yet, if he had the opportunity, if it was practicable, after being informed at Burkhalter's house of their intention, he could have made his escape from them with reasonable safety, and he failed to do so, but remained with them until the time of the killing, the immediate necessity or compulsion under which he acted at that time would be no excuse to him. As to whether escape was practicable to defendant, as we have stated, was a question of fact for the jury. The charge, numbered 1 and refused by the court, ignored this principle of law and phase of evidence, and demanded an acquittal of defendant if at the time of the killing the compulsion and coercion operated upon the defendant, and forced him to the commission of the act, notwithstanding he might have avoided the necessity by escape before that time. We do not hesitate to say he would have been justifiable in taking the life of Burkhalter and Leith, if there had been no other way open to enable him to avoid the necessity of taking the life of an innocent man. The charge requested was erroneous and misleading, in the respect that it ignored the law and evidence in these respects. *Affirmed.*

UNITED STATES v. JONES.

U. S. CIRCUIT COURT, DIST. PENNSYLVANIA. 1813.

[*Reported* 3 *Washington, C. C.* 209.]

THE prisoner was indicted for feloniously and piratically entering a certain Portuguese brig (by name), and assaulting the captain, &c. It appeared in evidence, on the part of the prosecution, that the defendant was the first lieutenant of a privateer schooner, called the "Revenge," William Butler master, duly commissioned by the President of the United States, on the 12th of October, 1812. The points of law raised by the counsel for the prisoner were five. The prisoner was an inferior officer, and was bound to obey the orders of Captain Butler; of course, he cannot be punished for having done so.[1]

[1] Only so much of the case as involves this point is given.

WASHINGTON, Justice, charged the jury. The only remaining question of law which has been raised in this cause is, that the prisoner ought to be presumed to have acted under the orders of his superior officer, which it was his duty to obey. This doctrine, equally alarming and unfounded, underwent an examination and was decided by this court in the case of General Bright. It is repugnant to reason, and to the positive law of the land. No military or civil officer can command an inferior to violate the laws of his country; nor will such a command excuse, much less justify, the act. Can it be for a moment pretended that the general of an army, or the commander of a ship of war, can order one of his men to commit murder or felony? Certainly not. In relation to the navy, let it be remarked, that the fourteenth section of the law for the better government of that part of the public force, which enjoins on inferior officers or privates the duty of obedience to their superior, cautiously speaks of the *lawful orders* of that superior.

Disobedience of an unlawful order must not, of course, be punishable; and a court-martial would, in such a case, be bound to acquit the person tried upon a charge of disobedience. We do not mean to go further than to say, that the participation of the inferior officer in an act which he knows, or ought to know, to be illegal, will not be excused by the order of his superior.[1]

52 Mich 2

PEOPLE v. DETROIT WHITE LEAD WORKS.

SUPREME COURT OF MICHIGAN. 1890.

[*Reported* 82 *Mich.* 471.]

GRANT, J.[2] This case is brought to this court by writ of *certiorari* from the Recorder's Court of the city of Detroit.

The defendants were convicted of unlawfully and wilfully creating and maintaining a nuisance, consisting of the creation and emission of unwholesome, offensive, and nauseating odors, smells, vapors, and smoke, to the great damage and common nuisance of all people living in the neighborhood thereof, and of all people passing and repassing on the streets and alleys adjacent thereto, contrary to an ordinance of the city in such case made and provided, being section 5, chap. 55, Rev. Ord. 1884. The ordinance in question is set forth in the return of the judge to the writ.

The defendant the Detroit White Lead Works is a corporation organized under the laws of the state. Defendant Hinchman is president, defendant Dean is vice-president, and defendant Rogers is treasurer and manager. The defendants Hinchman, Dean, and Rogers were

[1] *Acc.* Rex v. Thomas, 1 Russ. Crimes, 731; U. S. v. Carr, 1 Woods, 560; Com. v. Blodgett, 12 Met. 56. — ED.

[2] Part of the opinion is omitted.

fined $1 each, and the defendant the Detroit White Lead Works $10 and costs. No other penalty was imposed.

The facts found and returned by the Recorder's Court clearly establish a nuisance, according to all the authorities. These facts so found are conclusive in this court, and we can only apply the law to the facts. Counsel for defendants cannot, therefore, seriously contend that we can enter into a discussion and determination of that question, especially as the evidence is not before us.

Defendants are not aided by the fact found by the court that, during the time covered by the complaint, the business, in all respects, had been carried on in a careful and prudent manner, and nothing had been done by those managing it that was not a reasonable and necessary incident of the business; nor by the further fact that, when the defendant company commenced its business, the lands in the vicinity of its works were open common. It is undoubtedly true that the defendants, or their predecessors, established their works at a point remote from habitation, possibly in recognition of the fact that such a business was at least not pleasant, if not injurious, to the health and enjoyment of those living near it. The city of Detroit has extended to the defendants' works, and the owners of adjoining lands have erected dwellings thereon. This they, of course, had the legal right to do. The defendants cannot be protected in the enjoyment of their property, and the carrying on of their business, if it becomes a nuisance to people living upon the adjoining properties, and to those doing legitimate business with them. Whenever such a business becomes a nuisance, it must give way to the rights of the public, and the owners thereof must either devise some means to avoid the nuisance, or must remove or cease the business. It may not be continued to the injury of the health of those living in its vicinity. This rule is founded both upon reason and authority. Nor is it of any consequence that the business is useful or necessary, or that it contributes to the wealth and prosperity of the community. Wood, Nuis., § 19; Queen *v.* Train, 2 Best & S. 640; Works *v.* Railroad Co., 5 McLean, 425; Respublica *v.* Caldwell, 1 Dall. 150; Ross *v.* Butler, 19 N. J. Eq. 296; Robinson *v.* Baugh, 31 Mich. 290.

It is true that, in places of population and business, not everything that causes discomfort, inconvenience, and annoyance, or which, perhaps, may lessen the value of surrounding property, will be condemned and abated as a nuisance. It is often difficult to determine the boundary line in many such cases. The carrying on of many legitimate businesses is often productive of more or less annoyance, discomfort, and inconvenience, and may injure surrounding property for certain purposes, and still constitute no invasion of the rights of the people living in the vicinity. Such a case was Gilbert *v.* Showerman, 23 Mich. 448. A case similar in its facts was before this court in Robinson *v.* Baugh, 31 Mich. 290, which was distinguished by the court from Gilbert *v.* Showerman. In the former case the business was legitimate and neces-

sary. The suit was brought in equity to enjoin the business at the place where carried on. The facts were that smoke and soot from defendant's works were often borne by the wind in large amounts to the premises of the complainants, and sometimes entered their dwellings by the chimneys, and through cracks by the doors and windows, in such measure as to be extremely offensive and harmful, and the noise so great as to be disagreeable, and positively hurtful, the jar annoying and disturbing the sick, and in some cases causing substantial damage to dwellings. The court laid down the rule (page 296) as follows: —

"However lawful the business may be in itself, and however suitable in the abstract the location may be, they cannot avail to authorize the conductor of the business to continue it in a way which directly, palpably, and substantially damages the property of others, unless, indeed, the operator is able to plant himself on some peculiar ground of grant, covenant, license, or privilege which ought to prevail against complainants, or on some prescriptive right, and which in this country can rarely happen."

No case has been cited, and we think none can be found, sustaining the continuance of a business in the midst of a populous community, which constantly produces odors, smoke, and soot of such a noxious character, and to such an extent, that they produce headache, nausea, vomiting, and other pains and aches injurious to health, and taint the food of the inhabitants.

All the defendants were properly convicted. The officers of the company are jointly responsible for the business. It is not necessary to conviction that they should have been actually engaged in work upon the premises. The work is carried on by employees. The directors and officers are persons primarily responsible, and therefore the proper ones to be prosecuted. A fine can be collected against the defendant company, and therefore it is subject to prosecution.

5224H2

COMMONWEALTH *v.* MILLER.

SUPREME COURT OF PENNSYLVANIA, 1890.

[*Reported* 139 *Pa.* 77.]

WILLIAMS, J.[1] The defendants own and operate a refinery where crude petroleum and its products are prepared for market. There are four acres within the enclosure fronting on the Ohio river. The Pittsburgh & Western Railroad passes in front of it, along the river's edge. The Cleveland & Pittsburgh Railroad runs upon the street directly in the rear. The city of Allegheny, like its sister city Pittsburgh, owes its growth and prosperity to the extent of its manufacturing interests,

[1] Part of the opinion only is given.

and the river front is almost wholly given over to these great industries. The indictment charges that the defendants' refinery is a public and common nuisance, because of the emission therefrom of certain noxious and offensive smells and vapors, and because the oils and gases stored and used therein are inflammable, explosive, and dangerous. The jury, under the instructions of the court, found the defendants guilty, and the sentence which has been pronounced requires the abatement or destruction of a plant in which some three hundred thousand dollars are said to be invested, and which gives employment to seventy-five men. The assignments of error are quite numerous, but the important questions raised are few.

The first four assignments, the sixth, ninth, tenth, and sixteenth, may be considered together, as they relate more or less directly to the same subject. The learned judge had his attention directed by the written points to the definition of a public nuisance, and to the circumstances under which the defendants' refinery had been established and maintained for many years; and he instructed the jury that the character of the location where the refinery was established, the nature and importance of the business, the length of time it had been in operation, the capital invested, and the influence of the business upon the growth and prosperity of the community, were no defence to an indictment for nuisance. Among other expressions used by him are the following: "It is no defence to an indictment for a common nuisance that the business complained of has been in operation many years." "I do not think the size of an establishment makes any difference." And again: "Neither is it a defence in any measure that the business is a useful one," etc. If it had been an admitted or an established fact that the business of the defendants was a common nuisance, and they had attempted to justify its maintenance, these instructions would have been appropriate; but, the question before the jury was whether the business was a nuisance. The decision of that question depended upon a knowledge of all the circumstances peculiar to the business, the place, its surroundings, and the employments of the persons in the vicinity. While no one of these, nor all together, would justify the maintenance of a nuisance, they might be sufficient, and they certainly were competent evidence from which the jury might determine whether the defendants' refinery was a common nuisance at the place where it was located, and this was the question to be determined by the trial. They might make, therefore, or contribute to make, a defence to the indictment trying. This distinction between an effort to justify an admitted or established nuisance, and a denial that the business complained of amounts to a nuisance, was evidently in the mind of the learned judge, but, in the haste that attends jury trials, he failed to place it clearly before the jury. He did say that the facts referred to had "weight, and are to be considered in determining the degree of the injury produced, and whether the effects are so annoying, so productive of inconvenience

and discomfort, that it can be said to be really so prejudicial to the public as to be a nuisance," but, following an explicit statement that these same facts were "no defence to an indictment for erecting and maintaining a nuisance," such as they were then trying, the jury was left without an adequate presentation of the defence.

That such facts are proper for consideration and may make a defence, has been long and well settled: Wood on Nuis., § 430 The same rule was applied in this state in Huckenstine's App., 70 Pa. 102; and in Commonwealth *v.* Reed, 34 Pa. 275. The character of the business complained of must be determined in view of its own peculiar location and surroundings, and not by the application of any abstract principle. Wood *v.* Sutcliffe, 16 Jur. 75. In the case last cited, Lord Cranworth referred to a case at nisi prius, in which he had instructed the jury to consider, not only whether the quantity of smoke complained of would amount to a nuisance, considered abstractly, but "whether it is a nuisance to a person living in Shields," which was the name of the town in which the business was conducted. It was in this respect that the instructions complained of in the first, second, and third specifications were inadequate. They gave the general rule without the qualifications which the situation of the defendants' refinery entitled him to. The right to pure air is, in one sense, an absolute one, for all persons have the right to life and health, and such a contamination of the air as is injurious to health cannot be justified; but, in another sense, it is relative, and depends upon one's surroundings. People who live in great cities that are sustained by manufacturing enterprises must necessarily be subject to many annoyances and positive discomforts, by reason of noise, dust, smoke, and odors, more or less disagreeable, produced by and resulting from the business that supports the city. They can only be relieved from them by going into the open country. The defendants had a right to have the character of their business determined in the light of all the surrounding circumstances, including the character of Allegheny as a manufacturing city, and the manner of the use of the river front for manufacturing purposes. If, looked at in this way, it is a common nuisance, it should be removed; if not, it may be conducted without subjecting the proprietors to the pecuniary loss which its removal would involve.

525-712

REGINA v. RANDALL.

WINCHESTER ASSIZES. 1842.

[*Reported Car. & M.* 496.]

INDICTMENT for a nuisance in building and continuing a wharf in the navigable river Itchen. Plea, not guilty.

For the prosecution, it was proved that the wharf was built between high and low water-mark, and projected over a portion of the river on which boats formerly passed.

For the defence, it was shown that, before the erection of the wharf, there was no means of unloading trading vessels in the river, except by lightening them in the middle of the stream, and then getting them at high water on to the mud between high and low water-mark. Since the erection of the wharf in question such vessels had been unloaded at it, and thus the centre of the river was kept clear, and the general navigation improved.

It was contended for the prosecution that, in point of law, the verdict must be for the crown, if the jury should find that the wharf covered any part of the soil of the river over which boats formerly navigated. For the defendant, it was urged that, although the wharf covered a portion of the river over which boats formerly went, yet, that it was for the jury to say whether in fact any sensible nuisance or impediment to the navigation of the river by the public had been occasioned by the act of the defendant; and that, in coming to their conclusion, the jury were justified in taking into consideration the effect produced by the building and use of the wharf in keeping clear the channel of the river. The cases of Rex *v.* Russell, 6 B. & C. 566; Rex *v.* Ward, 4 A. & E. 384; and Rex *v.* Tindall, 6 A. & E. 143, were cited.

WIGHTMAN, J. (in summing up), left it to the jury to say whether the wharf itself occasioned any hinderance or impediment whatever to the navigation of the river by any description of vessels or boats; and told them that they were not to take into their consideration the circumstance that a benefit had resulted to the general navigation of the river by the mid-channel being kept clear, as proved by the defendant's witnesses.

The jury, however, could not agree upon their verdict; and, after being locked up throughout the night, were discharged.

5-26(1)Ld2

REX *v.* ROBERT OF HERTHALE.

SHROPSHIRE EYRE. 1203.

[1 *Selden Soc.* 31.]

ROBERT of Herthale, arrested for having in self-defence slain Roger, Swein's son, who had slain five men in a fit of madness, is committed to the sheriff that he may be in custody as before, for the King must be consulted about this matter.

5-26(2)Ld2

NOTE.

NORTHAMPTON ITER. 1328.

[*Reported Fitz. Abr. Coron.* 361.]

NOTE that when a man is acquitted before the justices errant for death of a man *soy defendendo*, the process is such that he shall have the writ of the Chief Justice, within which writ shall be contained all the record of his acquittal, to the Chancellor, who shall make him his writ of pardon without speaking to the King by course of law. Such a man is bailable after the acquittal, etc.

5-26(3)Ld2 ———

NOTE.

1346.

[*Reported Y. B.* 21 *Edw.* 3, 17.]

NOTE that a man was found guilty that he had killed another *se defendendo*; and yet his chattels shall be forfeited though his life shall be saved. And the cause was because at Common Law a man was

hanged in such a case as above, just as if he had done it feloniously; and though the king now by the statute[1] has released his life, his chattels remain as at common law.

MEMORANDUM.

1347.

[*Reported Fitz. Abr. Coron.* 261.]

WHERE a man justifies the death of another, as by warrant to arrest him, and he will not obey him, or that he comes to his house to commit burglary and the like, if the matter be so found, the justices let him go quit without the King's pardon; it is otherwise where a man kills another by misfortune, etc.

NOTE.

NEWGATE. 1368.

[*Reported* 43 *Lib. Assis.* 31.]

NOTE that at the delivery made at Newgate before KNIVET and LODEL, JJ., it was found by the verdict that a chaplain killed a man *se defendendo*. And the Judges asked how; and they said that the deceased pursued him with a stick and hit him; but the other struck back and killed him. And they said that the defendant might have fled from the assailant if he would. And therefore the Judges held him a felon, and said that he was bound to flee as far as he could to save his life. And the chaplain was adjudged to the Ordinary, etc.

[1] Statute of Gloucester, 6 Edw. 1, ch. 9.

The King commandeth that no writ shall be granted out of the Chancery for the death of a man to enquire whether a man did kill another by misfortune, or in his own defence, or in other manner without felony; but he shall be put in prison until the coming of the justices in eyre or justices assigned to the gaol-delivery, and shall put himself upon the country before them for good and evil. In case it be found by the country that he did it in his defence, or by misfortune, then by the report of the justices to the King, the King shall take him to his grace, if it please him.

MEMORANDUM.

CHANCERY. 1488.

[*Reported Y. B. 4 Hen. 7, 2.*]

IN the chancery it was moved that one was indicted because he killed a man *se ipsum defendendo*, etc. And the Chancellor said that the indictment should be removed into the King's Bench, and that he would grant a pardon of common grace unto the party according to their form.

And it was suggested by the Sergeants at the bar that there was no need of having any pardon in this case; for here the Justices would not arraign him, but dismiss him, &c.; but if the indictment were for felony and the party put himself upon the inquest for good and ill according to the statute of Gloc. c. 9, then if the inquest found that he did it *se defendendo*, the Justices would adjudge him to prison until he had a pardon; but here he should be dismissed, and not lose his goods.

FAIRFAX, J., who was in the Chancery, went to his companions and returned and said that their custom was to take inquest and inquire whether he did it *se defendendo* or not, and if so found, he lost his goods, etc.; and so in either way he should have a pardon by his opinion. And so it seemed to the Chancellor that a pardon should be granted.

Note the opinion of the Justices of the Bench against the Sergeants.

FOSTER, C. L. 273. Self-defence naturally falleth under the head of homicide founded in necessity, and may be considered in two different views. It is either that sort of homicide *se et sua defendendo*, which is perfectly innocent and justifiable, or that which is in some measure blameable and barely excusable. The want of attending to this distinction hath, I believe, thrown some darkness and confusion upon this part of the law.

The writers on the Crown Law, who, I think, have not treated the subject of self-defence with due precision, do not in terms make the distinction I am aiming at, yet all agree that there are cases in which a man may, without retreating, oppose force to force, even to the death. This I call justifiable self-defence, they justifiable homicide.

They likewise agree that there are cases in which the defendant can-

not avail himself of the plea of self-defence without showing that he retreated as far as he could with safety, and then, merely for the preservation of his own life, killed the assailant. This I call self-defence culpable, but through the benignity of the law excusable.

In the case of justifiable self-defence the injured party may repel force by force in defence of his person, habitation, or property, against one who manifestly intendeth and endeavoreth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing is justifiable.

The right of self-defence in these cases is founded in the law of nature, and is not, nor can be, superseded by any law of society. For before civil societies were formed (one may conceive of such a state of things, though it is difficult to fix the period when civil societies were formed), I say before societies were formed for mutual defence and preservation, the right of self-defence resided in individuals; it could not reside elsewhere; and since in cases of necessity, individuals incorporated into society, cannot resort for protection to the law of the society, that law with great propriety and strict justice considereth them, as still, in that instance, under the protection of the law of nature.

I will, by way of illustration, state a few cases, which, I conceive, are reducible to this head of justifiable self-defence.

Where a known felony is attempted upon the person, be it to rob or murder, here the party assaulted may repel force by force; and even his servant then attendant on him, or any other person present may interpose for preventing mischief; and if death ensueth, the party so interposing will be justified. In this case nature and social duty co-operate.

A woman in defence of her chastity may lawfully kill a person attempting to commit a rape upon her. The injury intended can never be repaired or forgotten; and nature, to render the sex amiable, hath implanted in the female heart a quick sense of honor, the pride of virtue, which kindleth and enflameth at every such instance of brutal lust. Here the law of self-defence plainly coincideth with the dictates of nature.

An attempt is made to commit arson or burglary in the habitation; the owner, or any part of his family, or even a lodger with him may lawfully kill the assailants for preventing the mischief intended. Here likewise nature and social duty co-operate.

I will now proceed to that sort of self-defence which is culpable and through the benignity of the law excusable. And this species of self-defence, I choose, upon the authority of the statute of Hen. VIII., to distinguish from the other by the name of homicide *se defendendo* upon chance-medley. The term "chance-medley" hath been very improperly applied to the case of accidental death, and in vulgar speech we generally affix that single idea to it. But the ancient legal notion of homicide by chance-medley was when death ensued from a combat between the

parties upon a sudden quarrel. How, upon the special circumstances of the case, the species of homicide *se defendendo* which I am now upon is distinguishable from that species of felonious homicide which we call manslaughter will be presently considered.

The difference between justifiable and excusable self-defence appeareth to me to be plainly supposed and pointed out by the statute I have just mentioned; for, after reciting that it had been doubted whether a person killing another attempting to rob or murder him under the circumstances there mentioned should forfeit goods and chattels, "As," proceedeth the statute, "any other person should do that by chance-medley should happen to kill or slay any other person in his or their defence," it enacteth that in the cases first mentioned the party killing shall forfeit nothing, but shall be discharged in like manner as if he were acquitted of the death.

He who, in the case of a mutual conflict, would excuse himself upon the foot of self-defence, must show that before a mortal stroke given he had declined any farther combat and retreated as far as he could with safety; and also that he killed his adversary through mere necessity, and to avoid immediate death. If he faileth in either of these circumstances he will incur the penalties of manslaughter.

The authorities I shall cite will serve to explain these principles, and in some measure fix the boundaries between the cases of manslaughter and excusable self-defence.

A. being assaulted by B. returneth the blow, and a fight ensueth. A. before a mortal wound given, declineth any farther conflict, and retreateth as far as he can with safety, and then, in his own defence, killeth B.; this is excusable self-defence; though, saith Stanford, A. had given several blows not mortal before his retreat.

But if the mortal stroke had been first given, it would have been manslaughter.

The cases here put suppose that the first assault was made upon the party who killed in his own defence. But as in the case of manslaughter upon sudden provocations, where the parties fight on equal terms, all malice apart, it mattereth not who gave the first blow; so, in this case of excusable self-defence, I think the first assault in a sudden affray, all malice apart, will make no difference, if either party quitteth the combat and retreateth before a mortal wound be given. But if the first assault be upon malice, which must be collected from circumstances, and the assailant, to give himself some color for putting in execution the wicked purposes of his heart, retreateth, and then turneth and killeth, this will be murder. If he had killed without retreating it would undoubtedly have been so; and the craft of flying rather aggravateth than excuseth, as it is a fresh indication of the malitia already mentioned, the heart deliberately bent upon mischief.

The other circumstance necessary to be proved in a plea of self-defence is that the fact was done from mere necessity, and to avoid immediate death. To this purpose I will cite a case adjudged upon

great deliberation. It was the case of one Nailor, which came on at O. B. in Apr. 1704, before Holt, Tracy, and Bury.

The prisoner was indicted for the murder of his brother, and the case upon evidence appeared to be, that the prisoner on the night the fact was committed came home drunk. His father ordered him to go to bed, which he refused to do; whereupon a scuffle happened betwixt the father and son. The deceased, who was then in bed, hearing the disturbance got up, and fell upon the prisoner, threw him down, and beat him upon the ground; and there kept him down, so that he could not escape nor avoid the blows; and as they were so striving together the prisoner gave the deceased a wound with a penknife; of which wound he died.

The judges present doubted, whether this was manslaughter or *se defendendo*, and a special verdict was found to the effect before set forth.

After Michaelmas term, at a conference of all the judges of England, it was unanimously holden to be manslaughter; for there did not appear to be any inevitable necessity so as to excuse the killing in this manner.

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5 3 1 (1) 7 4 2

ANONYMOUS.

[*Reported Kelyng*, 58.]

If A. hath malice against B. and meeteth him and striketh him, and then B. draweth at A., and A. flyeth back until he come to a wall, and then kills B., this is murder, notwithstanding his flying to the wall; for the craft of flying shall not excuse the malice which he had, nor shall any such device to wreak his malice on another, and think to be excused by law, avail him anything, but in such case the malice is enquirable, and if that be found by the jury, then his flight is so far from excusing the crime, that it aggravates it.

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5 3 1 (2) 7 4 2

REGINA v. HEWLETT.

Bristol Assizes. 1858.

[*Reported* 1 *Foster and Finlason*, 91.]

Wounding with intent. The prisoner was indicted for wounding with intent to do grievous bodily harm to the prosecutor. It appeared that the prisoner, with a knife, struck at one Withy. The prosecutor interfered and caught the blow intended for Withy on his arm.

Crowder, J. This will not sustain the charge of wounding with

intent to do grievous bodily harm to the prosecutor, but he may be convicted of unlawfully wounding.

It appeared that the prosecutor, Withy and two women, who had been drinking together, met the prisoner at midnight on the highway. Some words passed between them, when Withy struck the prisoner. The prisoner then made the blow, which was the subject of the charge. It was contended for him that, under the circumstances, he was justified in doing so.

CROWDER, J. (to the jury). Unless the prisoner apprehended robbery or some similar offence, or danger to life or serious bodily danger (not simply being knocked down), he would not be justified in using the knife in self-defence.

Not guilty.

5-32 H2

ROWE v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES, 1896.

[*Reported* 164 *U. S.* 546.]

HARLAN, J. We think that these portions of the charge (to which the accused duly excepted) were well calculated to mislead the jury. They expressed an erroneous view of the law of self-defense. The duty of the jury was to consider the case in the light of all the facts. The evidence on behalf of the government tended to show that the accused sought a difficulty with someone; that on behalf of the accused, would not justify any such conclusion, but rather that he had the reputation of being a peaceable and law-abiding man. But the evidence on both sides was to the effect that the deceased used language of an offensive character for the purpose of provoking a difficulty with the accused, or of subjecting him to the indignity of a personal insult. The offensive words did not, it is true, legally justify the accused in what he did — the evidence of the government tending to show that "he kicked at deceased, hitting him lightly on the lower part of the leg"; that on the part of the accused tending to show that he "kicked at" the deceased and "probably struck him lightly." According to the evidence of the defense, the accused then "stepped back, and leaned up against the counter," indicating thereby, it may be, that he neither desired nor intended to pursue the matter further. If the jury believed the evidence on behalf of the defense, they might reasonably have inferred from the actions of the accused that he did not intend to make a violent or dangerous personal assault upon the deceased, but only, by kicking at him or kicking him lightly, to express his indignation at the offensive lan-

guage of the deceased. It should have been submitted to the jury whether the act of the accused in stepping back and leaning against the counter, not in an attitude for personal conflict, was intended to be, and should have been reasonably interpreted as being, a withdrawal by the accused in good faith from further controversy with the deceased. On the contrary, the court, in effect, said that if, because of words used by the deceased, the accused kicked at or kicked the deceased, however lightly, and no matter how offensive those words were, he put himself in a position to make the killing manslaughter, even if the taking of life became, by reason of the suddenness, rapidity, and fierceness of the assault of the deceased, absolutely necessary to save his own. By numerous quotations from adjudged cases, the court, by every form of expression, pressed upon the jury the proposition that "a person who has slain another cannot urge in justification of the killing a necessity produced by his own unlawful and wrongful acts." But that abstract principle has no application to this case, if it be true — as the evidence on behalf of the defense tended to show — that the first real provocation came from the deceased when he used towards the accused language of an offensive character, and that the accused immediately after kicking at or lightly kicking the deceased, signified by his conduct that he no longer desired controversy with his adversary; whereupon the deceased, despite the efforts of the accused to retire from further contest, sprang at the latter, with knife in hand, for the purpose of taking life, and would most probably have accomplished that object, if the accused had not fired at the moment he did. Under such circumstances, did the law require that the accused should stand still, and permit himself to be cut to pieces, under the penalty that if he met the unlawful attack upon him and saved his own life, by taking that of his assailant, he would be guilty of manslaughter? We think not.

If a person, under the provocation of offensive language, assaults the speaker personally, but in such a way as to show that there is no intention to do him serious bodily harm, and then retires under such circumstances as show that he does not intend to do anything more, but in good faith withdraws from further contest, his right of self-defense is restored when the person assaulted, in violation of law, pursues him with a deadly weapon and seeks to take his life or do him great bodily harm. In Parker *v.* The State, 88 Alabama, 4, 7, the court, after adverting to the general rule that the aggressor cannot be heard to urge in his justification a necessity for the killing which was produced by his own wrongful act, said: "This rule, however, is not of absolute and universal application. An exception to it exists in cases where, although the defendant originally provoked the conflict, he withdraws from it in good faith, and clearly announces his desire for peace. If he be pursued after this, his right of self-defense, though once lost, revives. 'Of course,' says Mr. Wharton, in referring to this modification of the rule, 'there must be a real and *bona fide* surrender and withdrawal on his

part; for, if there be not, then he will continue to be regarded as the aggressor.' 1 Wharton's Cr. Law (9th ed.), § 486. The meaning of the principle is that the law will always leave the original aggressor an opportunity to repent before he takes the life of his adversary. Bishop's Cr. Law (7th ed.), § 871." Recognizing this exception to be a just one, the court properly said, in addition: "Due caution must be observed by courts and juries in its application, as it involves a principle which is very liable to abuse. The question of the good or bad faith of the retreating party is of the utmost importance, and should generally be submitted to the jury in connection with the fact of retreat itself, especially where there is any room for conflicting inferences on this point from the evidence." Both parties to a mutual combat are wrongdoers, and the law of self-defense cannot be invoked by either, so long as he continues in the combat. But, as said by the Supreme Court of Iowa in State *v.* Dillon, 74 Iowa, 653, 659, if one "actually and in good faith withdraws from the combat, he ceases to be a wrongdoer; and if his adversary have reasonable ground for holding that he has so withdrawn, it is sufficient, even though the fact is not clearly evinced." See also 1 Bishop's New Crim. Law, § 702; People *v.* Robertson, 67 California, 646, 650; Stoffer's Case, 15 Ohio St., 47. In Wharton on Homicide, § 483, the author says that "though the defendant may have thus provoked the conflict, yet, if he withdrew from it in good faith and clearly announced his desire for peace, then, if he be pursued, his rights of self-defense revive."

We do not mean to say that the jury ought to have found that the accused, after kicking the deceased lightly, withdrew in good faith from further contest and that his conduct should have been so interpreted. It was for the jury to say whether the withdrawal was in good faith, or was a mere device by the accused to obtain some advantage of his adversary. But we are of opinion that, under the circumstances, they might have found that the accused, although in the wrong when he kicked or kicked at the deceased, did not provoke the fierce attack made upon him by the latter, with knife in hand, in any sense that would deprive him altogether of the right of self-defense against such attack. If the accused did, in fact, withdraw from the combat, and intended so to do, and if his conduct should have been reasonably so interpreted by the deceased, then the assault of the latter with a deadly weapon, with the intent to take the life of the accused or to do him great bodily harm, entitled the latter to the benefit of the principle announced in Beard *v.* United States, 158 U. S. 550, 564, in which case it was said: "The defendant was where he had a right to be when the deceased advanced upon him in a threatening manner and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or to do him great bodily harm, he was not obliged to retreat, nor to consider whether he

could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such a way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury."

The charge, as above quoted, is liable to other objections. The court said that both the accused and the deceased had a right to be in the hotel, and that the law of retreat in a case like that is different from what it would be if they had been on the outside. Still, the court said that, under the circumstances, both parties were under a duty to use all reasonable means to avoid a collision that would lead to a deadly conflict, such as keeping out of the affray, or by not going into it, or "by stepping to one side"; and if the accused could have saved his life, or protected himself against great bodily harm, by inflicting a less dangerous wound than he did upon his assailant, or "if he could have paralyzed that arm," without doing more serious injury, the law commanded him to do so. In other words, according to the theory of the charge, although the deceased sprang at the accused, with knife in hand, for the purpose of cutting him to pieces, yet if the accused could have stepped aside or paralyzed the arm of his assailant, his killing the latter was not in the exercise of the right of self-defense. The accused was where he had a right to be, and the law did not require him to step aside when his assailant was rapidly advancing upon him with a deadly weapon. The danger in which the accused was, or believed himself to be, at the moment he fired is to some extent indicated by the fact, proved by the government, that immediately after he disabled his assailant (who had two knives upon his person) he said that he, the accused, was himself mortally wounded and wished a physician to be called. The accused was entitled, so far as his right to resist the attack was concerned, to remain where he was, and to do whatever was necessary or what he had reasonable grounds to believe at the time was necessary, to save his life or to protect himself from great bodily harm. And under the circumstances, it was error to make the case depend in whole or in part upon the inquiry whether the accused could, by stepping aside, have avoided the attack, or could have so carefully aimed his pistol as to paralyze the arm of his assailant without more seriously wounding him.

Without referring to other errors alleged to have been committed, the judgment below is reversed and the case is remanded for a new trial.

Reversed.

BROWN and PECKHAM, JJ., dissented.

5362 42

STOFFER v. STATE.

SUPREME COURT OF OHIO. 1864.

[*Reported* 15 *Ohio State*, 47.]

RANNEY, J.[1] From the bill of exceptions it appears that, after the state had given evidence tending to prove that the plaintiff made an assault upon Webb in the street, with the intent to murder him with a knife, and that in the conflict which ensued, Webb was killed by him, the plaintiff in error gave evidence tending to prove that he desisted from the conflict, declined further combat, and retreated rapidly a distance of one hundred and fifty feet, and took refuge in the house of a stranger, where he shut and held the door; that Webb, his brother, and one Dingman immediately pursued, throwing stones at him, and crying "Kill him!" as he retreated, and, forcibly opening the door, they entered the house and assaulted him, and in the conflict which immediately ensued, Webb was killed.

Upon this state of the evidence, counsel for the plaintiff in error requested the court to instruct the jury that the killing of Webb would be excusable, although the accused should have made the assault upon him with the malicious intent of killing him, if the jury should find that, before Webb had received any injury, the accused desisted from the conflict, and in good faith declined further combat, and retreated to a place which he might reasonably regard as a place of security, and that Webb and those in concert with him, immediately pursued and forcibly entered such place, and there made an assault upon the accused, in such manner as to warrant him in believing that his life was in danger at the hands of Webb, and without deliberation or malice, and to save his own life, he took that of Webb.

This instruction the court refused to give, but, in substance, charged the jury that, under such circumstances, the accused would be guilty of manslaughter, provided they "should regard the *conduct of Webb*, from the commencement of the conflict in the street to the time of the conflict in the house, as continuous."

The difference between the instruction asked and that given is easily appreciated. The one makes the *conduct of the accused* in declining, in good faith, further conflict, and retreating to a place of supposed security from the attacks of Webb, decisive of his right to defend himself there, when afterward assaulted by Webb and those in concert with him, and, if necessary to save his own life, without malice or premeditation to take that of Webb: while the other makes the *conduct of Webb* the test whether the conflict had so far terminated as to restore the accused to his right of self-defence, and denies him this right, if the conduct of Webb, from the conflict in the street to that in the house,

[1] Part of the case, not involving a question of justification, is omitted.

was to be regarded as continuous. We are not permitted to regard this retreat of the accused, as either colorable, or made to gain an advantage, with a view of renewing the assault upon Webb. The instruction requested assumed that it must have been made with the *bona fide* purpose of abandoning the conflict; and in the instruction given, the jury were charged that if the attack upon Webb in the street was murderous, the fact that the accused "repented and fled, . . . intending to quit the combat, and abandoning all murderous purpose," would have no further effect than to mitigate the crime to manslaughter.

Upon the precise question made in this case, very little light is thrown by actual adjudications; and it is not to be denied that some difference of opinion has obtained among elementary writers upon criminal law. The learned and humane Sir Matthew Hale has expressed an opinion upon the very point, in accordance with the instruction requested in the court below. He says: "Suppose that A. by malice makes a sudden assault upon B., who strikes again, and pursuing hard upon A., A. retreats to the wall, and, in saving his own life kills B.; some have held this to be murder, and not *se defendendo*, because A. gave the first assault. But Mr. Dalton thinketh it to be *se defendendo*, though A. made the first assault, *either with* or *without malice*, and then retreated. *It seems to me*, that if A. did retreat to the wall upon a real intent to save his life, and then merely in his own defence killed B., that it is *se defendendo*, and with this agrees Stamford's P. C. lib. 1, c. 7, fol. 15*a*. But if on the other side, A., knowing his advantage of strength, or skill, or weapon, retreated to the wall merely as a design to protect himself, under the shelter of the law, as in his own defence, but really intending to kill B., then it is murder or manslaughter, as the circumstance of the case requires." 1 Hale's P. C. 479, 480.

Sergeant Hawkins, however, thinks this opinion too favorable, and insists that the one who gives the first blow cannot be permitted to kill the other, even after retreating to the wall; because the necessity to which he is at last reduced was brought upon himself. 1 Hawk. P. C. 87.

Later English writers have generally contented themselves with stating the opposing opinions of these eminent authors, without adding anything material upon the subject. 4 Bl. Com. 186; 1 Russ. on Crimes, 662.

In our own country, Mr. Bishop, in his work on criminal law, has examined the whole subject with learning and ability, and coinciding, as we understand him, in the opinion expressed by Lord Hale, he thus expresses his own conclusion: "The space for repentance is always left open. And when the combatant does in good faith withdraw as far as he can, really intending to abandon the conflict, and not merely to gain fresh strength or some new advantage for an attack, but the other will pursue him, then, if taking life becomes inevitable to save life, he is justified." 2 Bishop on Crim. Law, s. 556.

But if the question cannot be said to be settled upon authority, we

think its solution upon principle very obvious, in the light of doctrines upon which all are agreed. It is very certain that while the party who first commences a malicious assault continues in the combat, and does not put into exercise the duty of withdrawing in good faith from the place, although he may be so fiercely pressed that he cannot retreat, or is thrown upon the ground or *driven* to the wall, he cannot justify taking the life of his adversary, however necessary it may be to save his own; and must be deemed to have brought upon himself the necessity of killing his fellow-man. "For otherwise," as said by Ch. J. Hale, "we should have all cases of murder or manslaughter, by way of interpretation, turned into *se defendendo*." 1 Hale, P. C. 482.

There is every reason for saying that the conduct of the accused, relied upon to sustain such a defence, must have been so marked, in the matter of time, place, and circumstance, as not only clearly to evince the withdrawal of the accused, in good faith, from the combat, but also such as fairly to advise his adversary that his danger had passed, and to make *his* conduct thereafter, the pursuit of vengeance, rather than measures taken to repel the original assault. But when this is made to appear, we know of no principle, however criminal the previous conduct of the accused may have been, which allows him to be hunted down and his life put in jeopardy, and denies him the right to act upon that instinct of self-preservation which spontaneously arises alike in the bosoms of the just and the unjust. There is no ground for saying that this right is forfeited by previous misconduct; nor did the court below proceed upon any such idea, since the jury were charged, that if the conflict which ensued upon the first assault had ended, and a new one was made by Webb and his associates in the house, the accused, under reasonable apprehension of loss of life or great bodily harm, would be justified in taking the life of his assailant. The error of the court consisted in supposing that whatever might be done by the accused to withdraw himself from the contest, the conflict would never end so long as Webb made *continuous* efforts to prolong it. If this is a sound view of the matter, the condition of the accused would not have been bettered if he had fled for miles and had finally fallen down with exhaustion, provided Webb was continuous in his efforts to overtake him. But this view is consistent with neither the letter nor spirit of the legal principle. A *conflict* is the work of at least two persons, and when one has wholly withdrawn from it, *that* conflict is ended; and it cannot be prolonged by the efforts of him who remains to bring on another. It is very true, that the original assault may have aroused the passions which impel the pursuer to take vengeance upon his adversary; and if death should ensue from his act, it might be entirely sufficient to mitigate the crime. But it would still be a crime, and the law cannot for a moment tolerate the execution of vengeance by private parties. If this were allowed, such passions might be as effectually aroused by words as blows; and, instead of the principle, so vital to the peace of society, that the law alone must be relied upon for the redress of all

injuries, we should have avengers of injuries, real or supposed, executing their punishments upon victims stripped of all legal power, whatever might be the necessity, of defending their own lives. It is needless to say that such a course would be alike destructive to public order and private security, and would be substituting for the empire of the laws, a system of force and violence.

A line of distinction must be somewhere drawn, which, leaving the originator of a combat to the necessary consequences of his illegal and malicious conduct, shall neither impose upon him punishments or disabilities unknown to the law, nor encourage his adversary to wreak vengeance upon him, rather than resort to the legal tribunals for redress; and we think, upon principle and the decided weight of authority, it lies precisely where we have already indicated. While he remains in the conflict, to whatever extremity he may be reduced, he cannot be excused for taking the life of his antagonist to save his own. In such case, it may be rightfully and truthfully said that he brought the necessity upon himself by his own criminal conduct. But when he has succeeded in wholly withdrawing himself from the contest, and that so palpably as, at the same time, to manifest his own good faith and to remove any just apprehension from his adversary, he is again remitted to his right of self-defence, and may make it effectual by opposing force to force, and, when all other means have failed, may legally act upon the instinct of self-preservation, and save his own life by sacrificing the life of one who persists in endangering it.

If these views are correct, their application to the case under consideration, is very obvious. Both the instruction requested, and that given, are based upon the hypothesis that the accused had, in good faith and abandoning all criminal purpose, withdrawn from the combat; that he had not only retreated to the wall, but behind the wall; and had not only gone from the view of his adversary, but to a place of supposed security from his attacks. In all this, his conduct was strictly lawful. In the language of the books, he "had actually put into exercise the duty of withdrawing from the place." It is very true that the evidence tended to implicate him in a very serious crime in the first attack upon Webb, for which his subsequent conduct could not atone, and for which he was then, and still is, liable to prosecution and punishment; but when Webb and his associates afterwards pursued and attacked him, they were wholly in the wrong, and necessarily took upon themselves all the hazards of such an unlawful enterprise.

5407 82

PEOPLE v. BUTTON.

SUPREME COURT OF CALIFORNIA. 1895.

[*Reported* 106 *Cal.* 628.]

GAROUTTE, J. The appellant was charged with the crime of murder and convicted of manslaughter. He now appeals from the judgment and order denying his motion for a new trial.

For a perfect understanding of the principle of law involved in this appeal it becomes necessary to state in a general way the facts leading up to the homicide. As to the facts thus summarized there is no material contradiction. The deceased, the defendant, and several other parties were camped in the mountains. They had been drinking, and, except a boy, were all under the influence of liquor more or less, the defendant to some extent, the deceased to a great extent. The deceased was lying on the ground with his head resting upon a rock, when a dispute arose between him and the defendant, and the defendant thereupon kicked or stamped him in the face. The assault was a vicious one, and the injuries of deceased occasioned thereby most serious. One eye was probably destroyed, and some bones of the face broken. An expert testified that these injuries were so serious as likely to produce in the injured man a dazed condition of mind, impairing the reasoning faculties, judgment, and powers of perception. Immediately subsequent to this assault the defendant went some distance from the camp, secured his horse, returned, and saddled it, with the avowed intention of leaving the camp to avoid further trouble. The time thus occupied in securing his horse and preparing for departure may be estimated at from five to fifteen minutes. The deceased's conduct and situation during the absence of defendant is not made plain by the evidence, but he was probably still lying where assaulted. At this period of time, the deceased advanced upon defendant with a knife, which was taken from him by a bystander, whereupon he seized his gun and attempted to shoot the defendant, and then was himself shot by the defendant and immediately died. There is also some further evidence that deceased ordered his dog to attack the defendant, and that defendant shot at the dog, but this evidence does not appear to be material to the question now under consideration.

Upon this state of facts the court charged the jury as to the law of the case, and declared to them in various forms the principle of law which is fairly embodied in the following instruction: "One who has sought a combat for the purpose of taking advantage of another, may afterward endeavor to decline any further struggle, and, if he really and in good faith does so before killing the person with whom he sought the combat for such purpose, he may justify the killing on the same ground as he might if he had not originally sought such combat for such purpose, provided that you also believe that his endeavor was

of such a character, so indicated as to have reasonably assured a reasonable man that he was endeavoring in good faith to decline further combat, unless you further believe that in the same combat in which the fatal shot was fired, and prior to the defendant endeavoring to cease further attack or quarrel, the deceased received at the hands of the defendant such injuries as deprived him of his reason or his capacity to receive impressions regarding defendant's design and endeavor to cease further combat."

It is to that portion of the foregoing instruction relating to the capacity of the deceased to receive impressions caused by the defendant's attack upon him that appellant's counsel has directed his assault; and our attention will be addressed to its consideration. The recital of facts indicates, to some extent at least, that the assault upon deceased was no part of the combat subsequently arising in which he lost his life; yet the events were so closely connected in point of time that the court was justified in submitting to the jury the question of fact as to whether or not the entire trouble was but one affray or combat. Section 197 of the Penal Code, wherein it says, in effect, that the assailant must really and in good faith endeavor to decline any further struggle before he is justified in taking life, is simply declarative of the common law. It is but the reiteration of a well-settled principle, and in no wise broadens and enlarges the right of self-defence as declared by courts and text-writers ever since the days of Lord Hale. It follows that the declaration of the code above cited gives us no light upon the matter at hand, and, from an examination of many books and cases, we are unable to find a single authority directly in point upon the principle of law here involved. It is thus apparent that the question is both interesting and novel.

The point at issue may be made fairly plain by the following illustrations: If a party should so violently assault another by a blow or stroke upon the head as to render that party incapable of understanding or appreciating the conditions surrounding him, and the party assailed should thereupon pursue the retreating assailant for many hours and miles with a deadly weapon and with deadly intent, and upon overtaking him should proceed to kill him, would the first assailant, the party retreating, be justified in taking the then aggressor's life in order to save his own? In other words, did the first assault, producing the effect that it did debar defendant (after retreating under the circumstances above depicted) from taking his opponent's life, even though that opponent at the time held a knife at his throat with deadly intent; or, putting it more concisely, did the aggressor by his first assault forfeit his life to the party assaulted? Or, viewing the case from the other side, should a man be held guiltless who without right assaults another so viciously as to take away his capacity to reason, to deprive him of his mind, and then kill him, because, when so assaulted, his assailant is unable to understand that the attacking party is retreating and has withdrawn from the combat in good faith? In other words,

may a defendant so assault another as to deprive him of his mind, and then kill him in self-defence when he is in such a condition that he is unable to understand that his assailant has withdrawn in good faith from the combat?

In order for an assailant to justify the killing of his adversary he must not only endeavor to really and in good faith withdraw from the combat, but he must make known his intentions to his adversary. His secret intentions to withdraw amount to nothing. They furnish no guide for his antagonist's future conduct. They indicate in no way that the assault may not be repeated, and afford no assurance to the party assailed that the need of defence is gone. This principle is fairly illustrated in Hale's Pleas of the Crown, page 482, where the author says: "But if A assaults B first, and upon that assault B re-assaults A, and that so fiercely that A cannot retreat to the wall or other *non ultra* without danger of his life, nay, though A falls upon the ground upon the assault of B and then kills B, this shall not be interpreted to be *se defendendo*." The foregoing principle is declared sound for the reason that, though A was upon the ground and in great danger of his life at the time he killed B, still he was the assailant, and at the time of the killing had done nothing to indicate to the mind of B that he had in good faith withdrawn from the combat, and that B was no longer in danger. In Stoffer *v.* State, 15 Ohio St. 47, 86 Am. Dec. 470, in speaking to this question, the court said: "There is every reason for saying that the conduct of the accused relied upon to sustain such a defence must have been so marked in the matter of time, place, and circumstance as not only clearly to evince the withdrawal of the accused in good faith from the combat, but also such as fairly to advise his adversary that his danger had passed, and to make his conduct thereafter the pursuit of vengeance, rather than measures taken to repel the original assault." It is also said in State *v.* Smith, 10 Nev. 106, citing the Ohio case: "A man who assails another with a deadly weapon cannot kill his adversary in self-defence until he has fairly notified him by his conduct that he has abandoned the contest; and, if the circumstances are such that he cannot so notify him, it is his fault, and he must take the consequences."

It is, therefore, made plain that knowledge of the withdrawal of the assailant in good faith from the combat must be brought home to the assailed. He must be notified in some way that danger no longer threatens him, and that all fear of further harm is groundless. Yet, in considering this question, the assailed must be deemed a man of ordinary understanding; he must be gauged and tested by the common rule — a reasonable man; his acts and conduct must be weighed and measured in the light of that test, for such is the test applied wherever the right of self-defence is made an issue. His naturally demented condition will not excuse him from seeing that his assailant has withdrawn from the attack in good faith. Neither his passion nor his cowardice will be allowed to blind him to the fact that his assailant is

running away, and all danger is over. If the subsequent acts of the attacking party be such as to indicate to a reasonable man that he in good faith has withdrawn from the combat, they must be held to so indicate to the party attacked. Again, the party attacked must also act in good faith. He must act in good faith toward the law, and allow the law to punish the offender. He must not continue the combat for the purpose of wreaking vengeance, for then he is no better than his adversary. The law will not allow him to say, "I was not aware that my assailant had withdrawn from the combat in good faith," if a reasonable man so placed would have been aware of such withdrawal. If the party assailed has eyes to see, he must see; and, if he has ears to hear, he must hear. He has no right to close his eyes or deaden his ears.

This brings us directly to the consideration of the point in the case raised by the charge of the court to the jury. While the deceased had eyes to see and ears to hear he had no mind to comprehend, for his mind was taken from him by the defendant at the first assault. Throughout this whole affray it must be conceded that the deceased was guilty of no wrong, no violation of the law. When he attempted to kill the defendant he thought he was acting in self-defence, and according to his lights, he was acting in self-defence. To be sure, those lights, supplied by a vacant mind, were dim and unsatisfactory, yet they were all the deceased had at the time, and not only were furnished by the defendant himself, but the defendant in furnishing them forcibly and unlawfully deprived the deceased of others which were perfect and complete. But where does the defendant stand? It cannot be said that he was guilty of no wrong, no violation of the law. It was he who made the vicious attack. It was he who was guilty of an unprovoked and murderous assault. It was he who unlawfully brought upon himself the necessity for killing the deceased. It cannot be possible that in a combat of this character no crime has been committed against the law. Yet the deceased has committed no offence. Neither can the defendant be prosecuted for an assault to commit murder, for the assault resulted in the commission of a homicide as a part of the affray. For these reasons we consider that the defendant cannot be held guiltless.

Some of the earlier writers hold that one who gives the first blow cannot be permitted to kill the other, even after retreating to the wall, for the reason that the necessity to kill was brought upon himself. (1 Hawkins' Pleas of the Crown, 87.) While the humane doctrine, and especially the modern doctrine, is more liberal to the assailant, and allows him an opportunity to withdraw from the combat, if it is done in good faith, yet it would seem that under the circumstances here presented the more rigid doctrine should be applied. The defendant not only brought upon himself the necessity for the killing, but, in addition thereto, brought upon himself the necessity of killing a man wholly innocent in the eyes of the law; not only wholly innocent as being a

person naturally *non compos*, but wholly innocent by being placed in this unfortunate condition of mind by the act of the defendant himself. We conclude, therefore, that the instruction contains a sound principle of law. The defendant was the first wrongdoer; he was the only wrongdoer; he brought on the necessity for the killing, and cannot be allowed to plead that necessity against the deceased, who at the time was *non compos* by reason of defendant's assault. The citations we have taken from Hale, the Ohio case, and the Nevada case, all declare that the assailant must notify the assailed of his withdrawal from the combat in good faith, before he will be justified in taking life. Here the defendant did not so notify the deceased. He could not notify him, for by his own unlawful act he had placed it out of his power to give the deceased such notice. Under these circumstances he left no room in his case for the plea of self-defence.

The court gave the following instruction to the jury as to the law bearing upon the facts of the case: "And no man, by his own lawless acts, can create a necessity for acting in self-defence, and then, upon killing the person with whom he seeks the difficulty, interpose the plea of self-defence, subject to the qualification next hereinafter set out. The plea of necessity is a shield for those only who are without fault in occasioning it and acting under it. The court instructs the jury that if you are satisfied that there was a quarrel between the defendant and deceased, in which the defendant was the aggressor and first assaulted the deceased by means or force likely to produce and actually producing great bodily injury to the deceased, and that the defendant thereafter in the same quarrel fatally shot the deceased, then you must find the defendant guilty, subject to this qualification."

This instruction appears to have been given subject to some qualification, and as to the extent and character of the qualification the record is not plain. But, whatever it may have been, the vice of the instruction could not be taken away. The instruction is bad law, and no explanation or qualification could validate it. It is not true that the plea of necessity is a shield for those only who are without fault in occasioning it and acting under it. As we have already seen, this is the rigid doctrine declared by Sergeant Hawkins, but not the humane doctrine of Lord Hale and modern authority. The latter portion of the instruction is in direct conflict with the Stoffer case, already cited, where the declaration of the same principle in a somewhat different form caused a reversal of the judgment. It was there said: "If this is a sound view of the matter, the condition of the accused would not have been bettered if he had fled for miles, and had finally fallen down with exhaustion, provided Webb was continuous in his efforts to overtake him. But this view is consistent with neither the letter nor the spirit of the legal principle." The instruction assumes that, if the defendant was the aggressor, the quarrel could subsequently assume no form or condition whereby the defendant would be justified in taking the life of the party assailed. The law of self-defence is to the contrary,

and is clearly recognized to the contrary by the provision of the Penal Code to which we have already referred.

The court also gave the jury the following instruction to guide them in their deliberations: "If you find from the evidence that, prior to the time of the shooting of the deceased by the defendant, they had a quarrel and altercation, and that the defendant stamped or kicked the deceased in the face, and that defendant thereafter really and in good faith, although he was the assailant, endeavored to decline any further struggle before the homicide was committed, and that [after the first assault had ceased, and there had an interval elapsed between said first assault and the final assault, making said assaults respectively, although in some degree related to each other, yet substantially distinct transactions, each attended with its own separate circumstances] the deceased procured his gun and made such an attempt to shoot defendant as gave the defendant reasonable ground to apprehend and fear that the deceased was about to take his life, or do him great bodily injury, and that, acting under such reasonable apprehension alone, defendant shot the deceased, then you will acquit the defendant; and this will be your duty, notwithstanding the defendant may have been in the wrong in first assailing or attacking the deceased." That portion of the charge inclosed in brackets embodied a modification of the original charge, as asked by counsel, and we think should not have been inserted. It had a tendency to mislead the jury, and the instruction was perfectly sound without it. The question as to the capacity of the deceased's mind to understand and appreciate was not an element involved in this charge, and with that the court was not then dealing; but by the modification it deprived the defendant of the right to go before the jury upon the plea of self-defence, if there was but one assault which led up to the homicide. The right of the defendant to act in self-defence was in no way dependent upon the commission of two assaults. If there was but one assault which caused the combat, even though that assault was a part of the combat, and was made by the defendant, still he had the right of self-defence if his subsequent conduct was such as to indicate to the assaulted party that he had withdrawn in good faith from the struggle. The effect of the modification was to plainly intimate to the jury that, if the whole affray was but one connected quarrel or altercation, then the defendant, under no possible set of circumstances, could be justified in law in killing his adversary. This is wrong. As to the true solution of the question by the jury which the court was then discussing, it was entirely immaterial whether or not there was one or two assaults.

We think the questions we have discussed dispose of all material matters raised upon the appeal.

For the foregoing reasons the judgment and order are reversed and the cause remanded for a new trial.

54 Pa 82

COMMONWEALTH v. DRUM.

COURT OF OYER AND TERMINER, PENNSYLVANIA. 1868.

[*Reported* 58 *Pa.* 9.]

WILLIAM DRUM was charged in the Court of Quarter Sessions of Westmoreland county for the murder of David Mohigan. A true bill having been found by the grand jury of that court, it was certified into the Court of Oyer and Terminer of the same county.

AGNEW, J., charged the jury as follows.[1] . . .

The previous occurrences on Monday night and Thursday night furnished no justification or even excuse to Mohigan in making the attack upon the prisoner on Thursday night at the saloon. This attack constituted a sufficient ground on part of the prisoner to defend himself in a proper manner. But this defence, as I have before said, must not exceed the reasonable bounds of the necessity. Here the jury must attend to this important distinction. The argument of the defence is, that when the slayer is not in fault — is not fighting at the time, or has given up the fight — and then slays his adversary, he is excusable as in self-defence. But though this may be the case, it is not always so. The true criterion of self-defence, in such a case, is, whether there existed such a necessity for killing the adversary as required the slayer to do it in defence of his life or in the preservation of his person from great bodily harm. If a man approaches another with an evident intention of fighting him with his fists only, and where, under the circumstances, nothing would be likely to eventuate from the attack but an ordinary beating, the law cannot recognize the necessity of taking life with a deadly weapon. In such a case it would be manslaughter; and if the deadly weapon was evidently used with a murderous and bad-hearted intent, it would even be murder. But a blow or blows are just cause of provocation, and if the circumstances indicated to the slayer a plain necessity of protecting himself from great bodily injury, he is excusable if he slays his assailant in an honest purpose of saving himself from this great harm.

The right to stand in self-defence without fleeing has been strongly asserted by the defence. It is certainly true that every citizen may rightfully traverse the street, or may stand in all proper places, and need not flee from every one who chooses to assail him. Without this freedom our liberties would be worthless. But the law does not apply this right to homicide. The question here does not involve the right of merely ordinary defence, or the right to stand wherever he may rightfully be, but it concerns the right of one man to take the life of another. Ordinary defence and the killing of another evidently stand upon different footing. When it comes to a question whether one man shall flee or another shall live, the law decides that the former shall rather flee than that the latter shall die.

[1] Only so much of the charge as is concerned with the question of self-defence is given. — ED.

5472+2

STATE v. DONNELLY.

SUPREME COURT OF IOWA. 1886.

[*Reported* 69 *Iowa*, 705.]

ADAMS, C. J.[1]—The defendant shot his father, Patrick Donnelly, with a shot-gun, causing a wound of which he died about two days afterwards. The deceased had become very angry with the defendant, and at time of the firing of the fatal shot was pursuing the defendant with a pitchfork, and the circumstances were such that we think that the jury might have believed that he intended to take the life of the defendant. On the other hand, the circumstances were such that we think that the jury might have believed that the defendant could have escaped, and fully protected himself by retreating, and that he had reasonable ground for so thinking.

The court gave an instruction in these words: "You are instructed that it is a general rule of the law that, where one is assaulted by another, it is the duty of the person thus assaulted to retire to what is termed in the law a wall or ditch before he is justified in repelling such assault in taking the life of his assailant. But cases frequently arise where the assault is made with a dangerous or deadly weapon, and in so fierce a manner as not to allow the party thus assaulted to retire without manifest danger to his life or of great bodily injury; in such cases he is not required to retreat." The defendant assigns the giving of this instruction as error. He contends that the court misstated the law in holding, by implication, that he is excused from doing so only where it would manifestly be dangerous to attempt it. His position is, that the assailed is under obligation to retreat only where the assault is not felonious, and that where it is felonious, as the evidence tends to show in this case, he may stand his ground and kill his assailant, whatever his means of retreat and escape might be, provided only he had reasonable cause for believing that if he stood his ground, and did not kill his assailant, his assailant would kill him, or inflict a great bodily injury. Under this theory and the evidence, the jury might have found that the defendant was justified in killing his father, and that, too, even though there had been other evidence showing that his father was so old and decrepit that the defendant could have escaped him by simply walking away from him. It is, perhaps, not to be denied that the defendant's theory finds some support in text-books and decisions; but in our opinion it cannot be approved. This court has, to be sure, held that a person assailed in his own house is not bound to retreat, though by doing so he might manifestly secure his safety. State *v.* Middleham, 62 Iowa, 150. While there is some ground for contending that the rule does not fully accord with the sacredness which in later years is attached to human life, the course of decisions appeared to be

[1] Part of the opinion only is given.

such as not to justify a departure from it. The rule for which the defendant contends seems, so far as it finds support in the authorities, to be based upon the idea that, where a person attempts to commit a felony, it is justifiable to take the offender's life if that is the only way in which he can be prevented from consummating the felony attempted. But where a person is assailed by another who attempts to takes his life, or inflict great bodily injury, and the assailed can manifestly secure safety by retreating, then it is not necessary to take the life of the assailant to prevent the consummation of the felony attempted. In Roscoe, Crim. Ev. 768, note, the annotator says: "When a man expects to be attacked, the right to defend himself does not arise until he has done everything to avoid that necessity," — citing People *v.* Sullivan, 7 N. Y. 396; Mitchell *v.* State, 22 Ga. 211; Lyon *v.* State, id. 399; Cotton *v.* State, 31 Miss. 504; People *v.* Hurley, 8 Cal. 390; State *v.* Thompson, 9 Iowa, 188; U. S. *v.* Mingo, 2 Curt. 1. In our opinion the court did not err in giving the instruction in question.[1]

[1] In State *v.* Bartlett, 170 Mo. 658, 668, SHERWOOD, P. J., said: "Defendant, when first assaulted and beaten by Edwards on the street, was not bound to retreat to his office. He had a right to be where he was, and the wrong of Edwards in assaulting and beating him there, could not deprive him of that right and so this court has, in effect, decided. [State *v.* Evans, 124 Mo. 397; see, also, State *v.* Hudspeth, 150 Mo. *loc. cit.* 33, and cases cited.] Because the right to go where one will without let or hindrance, despite of threats made, necessarily implies the right to stay where one will without let or hindrance. These remarks are controlled by the thought of a lawful right to be in the particular locality to which he goes, or in which he stays.

"It is true, human life is sacred, but so is human liberty; one is as dear in the eye of the law as the other, and neither is to give way and surrender its legal status in order that the other may exclusively exist, supposing for a moment such an anomaly to be possible. In other words, the wrongful and violent act of one man shall not abolish or even temporarily suspend the lawful and constitutional right of his neighbor. And this idea of the non-necessity of retreating from any locality where one has the right to be, is growing in favor, as all doctrines based upon sound reason inevitably will, and has found voice and expression elsewhere."

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BEARD *v.* UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1894.

[*Reported* 158 *U. S.* 550.]

HARLAN, J.[1] . . . The court below committed an error of a more serious character when it told the jury, as in effect it did by different forms of expression, that if the accused could have saved his own life and avoided taking the life of Will Jones by retreating from and getting out of the way of the latter as he advanced upon him, the law made it his duty to do so; and if he did not, when it was in his power to do so without putting his own life or body in imminent peril, he was guilty of manslaughter. The court seemed to think if the deceased had advanced upon the accused while the latter was in his dwelling-house and under such circumstances as indicated the intention of the former to take life or inflict great bodily injury, and if, without retreating, the accused had taken the life of his assailant, having at the time reasonable grounds to believe, and in good faith believing, that his own life would be taken or great bodily harm done him unless he killed the accused, the case would have been one of justifiable homicide. To that proposition we give our entire assent. But we cannot agree that the accused was under any greater obligation, when on his own premises, near his dwelling-house, to retreat or run away from his assailant, than he would have been if attacked within his dwelling-house. The accused being where he had a right to be, on his own premises, constituting a part of his residence and home, at the time the deceased approached him in a threatening manner, and not having by language or by conduct provoked the deceased to assault him, the question for the jury was whether, without fleeing from his adversary he had, at the moment he struck the deceased, reasonable grounds to believe, and in good faith believed, that he could not save his life or protect himself from great bodily harm except by doing what he did, namely, strike the deceased with his gun, and thus prevent his further advance upon him. Even if the jury had been prepared to answer this question in the affirmative — and if it had been so answered, the defendant should have been acquitted — they were instructed that the accused could not properly be acquitted on the ground of self-defence if they believed that, by retreating from his adversary, by "getting out of the way," he could have avoided taking life. We cannot give our assent to this doctrine.

The application of the doctrine of "retreating to the wall" was carefully examined by the Supreme Court of Ohio in Erwin *v.* State, 29 Ohio St. 186, 193, 199. That was an indictment for murder, the de-

[1] Only so much of the opinion as discusses the question of self-defence is given. — ED.

fendant being found guilty. The trial court charged the jury that if the defendant was in the lawful pursuit of his business at the time the fatal shot was fired, and was attacked by the deceased under circumstances denoting an intention to take life or to do great bodily harm, he could lawfully kill his assailant provided he used all means "in his power" otherwise to save his own life or prevent the intended harm, "such as retreating as far as he can, or disabling his adversary, without killing him, if it be in his power;" that if the attack was so sudden, fierce, and violent that a retreat would not diminish but increase the defendant's danger, he might kill his adversary without retreating; and further, that if from the character of the attack there was reasonable ground for defendant to believe, and he did honestly believe, that his life was about to be taken, or he was to suffer great bodily harm, and that he believed honestly that he would be in equal danger by retreating, then, if he took the life of the assailant, he was excused. Of this charge the accused complained.

Upon a full review of the authorities and looking to the principles of the common law, as expounded by writers and courts of high authority, the Supreme Court of Ohio held that the charge was erroneous, saying: "It is true that all authorities agree that the taking of life in defence of one's person cannot be either justified or excused, except on the ground of necessity; and that such necessity must be imminent at the time; and they also agree that no man can avail himself of such necessity if he brings it upon himself. The question then is simply this: Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself on the sole ground that he failed to fly from his assailant when he might safely have done so? The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life where the assault is provoked; but a true man who is without fault is not obliged to fly from an assailant, who by violence or surprise maliciously seeks to take his life or to do him enormous bodily harm. Now, under the charge below, notwithstanding the defendant may have been without fault, and so assaulted, with the necessity of taking life to save his own upon him; still the jury could not have acquitted if they found he had failed to do all in his power otherwise to save his own life, or prevent the intended harm, as retreating as far as he could, etc. In this case we think the law was not correctly stated."

In Runyan *v.* State, 57 Indiana, 80, 84, which was an indictment for murder, and where the instructions of the trial court involved the present question, the court said: "A very brief examination of the American authorities makes it evident that the ancient doctrine, as to the duty of a person assailed to retreat as far as he can, before he is justified in repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly

against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts, bearing on the general subject of the right of self-defence. The weight of modern authority, in our judgment, establishes the doctrine that, when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defence, his assailant is killed, he is justifiable. . . . It seems to us that the real question in the case, when it was given to the jury, was, was the defendant, under all the circumstances, justified in the use of a deadly weapon in repelling the assault of the deceased? We mean by this, did the defendant have reason to believe, and did he in fact believe, that what he did was necessary for the safety of his own life or to protect him from great bodily harm? On that question the law is simple and easy of solution, as has been already seen from the authorities cited above."

In East's Pleas of the Crown, the author, considering what sort of an attack it was lawful and justifiable to resist, even by the death of the assailant, says: "A man may repel force by force in defence of his person, habitation, or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is called justifiable self-defence; as, on the other hand, the killing by such felon of any person so lawfully defending himself will be murder. But a bare fear of any of these offences, however well grounded, as that another lies in wait to take away the party's life, unaccompanied with any overt act indicative of such an intention, will not warrant in killing that other by way of prevention. There must be an actual danger at the time." p. 271. So in Foster's Crown Cases: "In the case of justifiable self-defence, the injured party may repel force with force in defence of his person, habitation, or property, against one who manifestly intendeth and endeavoreth, with violence or surprise, to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable." c. 3, p. 273.

In Bishop's New Criminal Law, the author, after observing that cases of mere assault and of mutual quarrel, where the attacking party has not the purpose of murder in his heart, are those to which is applied the doctrine of the books, that one cannot justify the killing of another, though apparently in self-defence, unless he retreat to the wall or other interposing obstacle before resorting to this extreme right, says that "where an attack is made with murderous intent, the person attacked is under no duty to fly; he may stand his ground, and if need

be, kill his adversary. And it is the same where the attack is with a deadly weapon, for in this case the person attacked may well assume that the other intends murder, whether he does in fact or not." Vol. 1, § 850. The rule is thus expressed by Wharton: "A man may repel force by force in the defence of his person, habitation, or property, against any one or many who manifestly intend and endeavor by violence or surprise to commit a known felony on either. In such case he is not compelled to retreat, but may pursue his adversary until he finds himself out of danger, and if in the conflict between them he happen to kill him, such killing is justifiable." 2 Wharton on Crim. Law, § 1019, 7th rev. ed. Phila. 1874. See also Gallagher *v.* State, 3 Minnesota, 270, 273; Pond *v.* People, 8 Michigan, 150, 177; State *v.* Dixon, 75 N. C. 275, 295; State *v.* Sherman, 16 R. I. 631; Fields *v.* State, 32 N. E. Rep. 780; Eversole *v.* Commonwealth, 26 S. W. Rep. 816; Haynes *v.* State, 17 Georgia, 465, 483; Long *v.* State, 52 Mississippi, 23, 35; Tweedy *v.* State, 5 Iowa, 433; Baker *v.* Commonwealth, 19 S. W. Rep. 975; Tingle *v.* Commonwealth, 11 S. W. 812; 3 Rice's Ev. § 360.

In our opinion the court below erred in holding that the accused, while on his premises, outside of his dwelling-house, was under a legal duty to get out of the way, if he could, of his assailant, who, according to one view of the evidence, had threatened to kill the defendant, in execution of that purpose had armed himself with a deadly weapon, with that weapon concealed upon his person went to the defendant's premises, despite the warning of the latter to keep away, and by word and act indicated his purpose to attack the accused. The defendant was where he had the right to be, when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury.

As the proceedings below were not conducted in accordance with these principles, the judgment must be reversed and the cause remanded with directions to grant a new trial.

Other objections to the charge of the court are raised by the assignments of error, but as the questions which they present may not arise upon another trial, they will not be now examined.

Judgment reversed.[1]

[1] See Allen *v.* U. S., 164 U. S. 492. In that case BROWN, J., said: "Nor is there anything in the instruction of the court that the prisoner was bound to retreat as far as he

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ACERS v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1896.

[*Reported* 164 *U. S.* 388.]

BREWER, J. Plaintiff in error was convicted in the District Court for the Western District of Arkansas of an assault with intent to kill, and sentenced to the penitentiary for the term of two years and six months. The undisputed facts were these: Defendant and one Joseph M. Owens had some dispute about business affairs, and while returning together to the house where they were both stopping, defendant picked up a stone about three inches wide, nine inches long and an inch and a half or two inches thick, and with it struck Owens on the side of the head, fracturing the skull. The defence was that there was no intent to kill; that defendant acted in self-defence; that, believing Owens was about to draw a pistol, he picked up the stone and pushed him down; and the disputed matters were whether Owens had a pistol, and if so, whether he attempted to draw it, or made any motions suggestive of such a purpose. The verdict of the jury was averse to the contentions of the defendant.

The only questions presented for our consideration arise on the charge of the court, and may be grouped under four heads: First, as to the evidences of intent; second, as to what constitutes a deadly weapon; third, as to real danger; and fourth, as to apparent danger. It may be premised that the exceptions to this charge are taken in the careless way which prevails in the Western District of Arkansas; but passing this and considering the charge as properly excepted to, we find in it no substantial error.[1]

Third. With reference to the matter of self-defence by reason of the presence of a real danger, the court charged that it could not be a past danger, or a danger of a future injury, but a present danger and a danger of "great injury to the person injured that would maim him, or that would be permanent in its character, or that might produce death." In this we think nothing was stated incorrectly, and that there was a fair definition of what is necessary to constitute self-defence by reason of the existence of a real danger.

could before slaying his assailant that conflicts with the ruling of this court in Beard *v.* United States, 158 U. S. 550. That was the case of an assault upon the defendant upon his own premises, and it was held that the obligation to retreat was no greater than it would have been if he had been assailed in his own house. So, too, in the case of Alberty *v.* United States, 162 U. S. 499, the defendant found the deceased trying to obtain access to his wife's chamber through a window, in the night-time, and it was held that he might repel the attempt by force, and was under no obligation to retreat if the deceased attacked him with a knife. The general duty to retreat instead of killing when attacked was not touched upon in these cases. Whart. on Homicide, § 485." — ED.

[1] The discussion of the first two questions is omitted. — ED.

Neither, fourthly, do we find anything to condemn in the instructions in reference to self-defence based on an apparent danger. Several approved authorities are quoted from in which the doctrine is correctly stated that it is not sufficient that the defendant claims that he believed he was in danger, but that it is essential that there were reasonable grounds for such belief, and then the rule was summed up in this way:

"Now these cases are along the same line, and they are without limit, going to show that, as far as this proposition of apparent danger is concerned, to rest upon a foundation upon which a conclusion that is reasonable can be erected there must be some overt act being done by the party which from its character, from its nature, would give a reasonable man, situated as was the defendant, the ground to believe — reasonable ground to believe — that there was danger to his life or of deadly violence to his person, and unless that condition existed then there is no ground upon which this proposition can stand; there is nothing to which the doctrine of apparent danger could apply."

Counsel criticise the use of the words "deadly violence," as though the court meant thereby to limit the defence to such cases as showed an intention on the part of the person assaulted to take the life of the defendant, but obviously that is not a fair construction of the language, not only because danger to life is expressly named, but also because in other parts of the charge it had indicated that what was meant by those words was simply great violence. This is obvious from this language, found a little preceding the quotation: "'When from the nature of the attack.' You look at the act being done, and you from that draw an inference as to whether there was reasonable ground to believe that there was a design upon the part of Owens in this case to destroy the life of the defendant Acers or to commit any great violence upon his person at the time he was struck by the rock. 'When from the nature of the attack.' That implies not that he can act upon a state of case where there is a bare conception of fear, but that there must exist that which is either really or apparently an act of violence, and from that the inference may reasonably be drawn that there was deadly danger hanging over Acers, in this case, at that time."

These are all the matters complained of. We see no error in the rulings of the court, and, therefore, the judgment is *Affirmed.*

STATE v. EVANS.

SUPREME COURT OF MISSOURI.

[*Reported* 124 *Mo.* 397.]

SHERWOOD, J.[1] It was developed by the evidence that Peter Fine, the deceased, rented a farm owned by defendant's wife; both defendant and deceased and their families living on the farm and occupying portions of the same dwelling house. The term of Fine had about expired, and he had been informed by defendant that he wanted possession of the farm on the expiration of the year for which it was rented to him. This announcement displeased Fine and gave rise to altercations between the parties, and threats on the part of Fine towards defendant, so much so, that several days before the homicide occurred, defendant felt it to be necessary to take steps and secure the arrest of Fine in order to have him bound over to keep the peace. His arrest greatly enraged Fine, and he made threats of taking defendant's life unless he got off the place, etc.; these threats, some of them, extending even down to the morning of the day on which Fine was shot, the twenty-fifth of October. On the morning of that day, having been freshly threatened, defendant for his own protection deemed it necessary to procure a pistol, which he did by riding to Boonville for that purpose, and having loaded the weapon, returned home with it in his pocket, reaching there about noon. After putting his horse up in the stable, he went to his house, and after some talk with his wife about domestic affairs, went down for some corn into the cornfield where the tragedy which forms the subject of the present prosecution, occurred.

Speaking of the instructions generally, and taking them as a whole, they are such as have frequently received the approval of this court. Express objection has, however, been taken to the eighth instruction couched in this language:

"If you find from the evidence that the defendant armed himself with a deadly weapon and went to where the deceased was, expecting the deceased to assault him, and with the intent of inflicting death or great personal injury upon the deceased, then he can not be justified upon the ground of self-defence, even though you should find that the deceased was about to kill him or inflict upon him some great personal injury. But the fact that he went to the field where the deceased was would not deprive him of the right of self-defence if he went with some other purpose and not with the expectation that a difficulty would arise, and with the intent of inflicting death or a great personal injury upon the deceased."

The fact that defendant expected an attack did not abate by one jot

[1] Only so much of the opinion as discusses the question of self-defence is given. — ED.

or tittle his right to arm himself in his own proper defence, nor to go where he would, after thus arming himself, so long as he did no overt act or made no hostile demonstrations toward Fine. Defendant was where he had a right to be, the land belonged to his wife; he had a right to see that proper division was made of the crop, and to oversee such division. State *v.* Forsythe, 89 Mo. 667.

If the mere expectation of an assault from an adversary is to deprive the expectant of the right of self-defence, merely because he goes armed in the vicinity of his enemy, or goes out prepared upon the highway where he is likely at any moment to meet him, then he has armed himself in vain, and self-defence ceases wherever expectation begins.

We do not so understand the law. The very object of arming oneself is not to destroy expectation of a threatened attack, but to be prepared for it should it unfortunately come. Our legislature has sanctioned this view by making the carrying of concealed weapons non-punishable, when the accused has been threatend with great bodily harm, etc. R. S. 1889, sec. 3503. The instruction must, therefore, be ruled erroneous.

CREIGHTON *v.* COMMONWEALTH.

COURT OF APPEALS OF KENTUCKY. 1886.

[*Reported* 84 *Kentucky*, 103.]

PRYOR, J.[1] The case under consideration has been heretofore in this court, and the judgment of conviction reversed.

The appellant was indicted, tried, and convicted of manslaughter for the killing of Ambrose Wilson.

It is claimed by the accused that Wilson attempted to arrest him for a misdemeanor when he was not a peace officer, and had no authority to take charge of his person or make the arrest, and that in the unlawful conduct of Wilson originated the altercation resulting in his death. This court held in the former opinion (83 Ky. 142) that the deceased was not a peace officer, and in attempting to make the arrest was guilty of a trespass, and that this fact should not have been excluded from the consideration of the jury.

In resisting the arrest — and this the accused had the right to do — he could not take the life of Wilson unless his own life was in danger, or to save his person from great bodily injury. If either fact existed, or if he had reasonable grounds to believe, and did believe, that he was in imminent peril of losing his life, then, for his own protection, he had the right to take the life of the deceased.

The right of protection against all forcible attacks upon the person

[1] Part of the opinion only is given.

belongs to every man; but the extent to which this may go, or the manner of defence, is an important inquiry. Human life cannot be taken unless to protect the life of another, or prevent the infliction of some great bodily injury, and the degree of force to be used must be determined by the character of the attack made. "Although a man will not be justified, then, if he kill in defence against an illegal arrest of an ordinary character, yet the law sets such a high value upon the liberty of the citizen that an attempt to arrest him unlawfully is esteemed a great provocation, such as will reduce a killing in the resistance of such an arrest to manslaughter." Commonwealth *v.* Carey, 12 Cush. 246; Roberts *v.* State, 14 Mo. 138; 1 Hale's Pleas of the Crown, 457; note to Horrigan & Thompson's Cases on Self-Defence, p. 816.

Bishop says: "The attempt to take away one's liberty is not such an aggression as may be resisted to the death. Nothing short of an endeavor to destroy life will justify the taking of life, is a doctrine that prevails in such a case." 1 Bishop's Crim. Law, § 868.

At first impression it would seem that in the attempt to deprive one wrongfully of his personal liberty, the party assaulted should be permitted to use all the force necessary to release himself from the unlawful arrest, or to prevent the imprisonment; *for life being valueless without liberty*, the modes of defence for the preservation of human life should be allowed for the maintenance of human liberty.

Mr. Bishop says: "The reason why a man may not oppose an attempt on his liberty by the same extreme measures permissible in an attempt on his life, may be because liberty can be secured by a resort to the laws." 1 Bishop's Crim. Law, § 868.

There are cases in which the party subjected to the unlawful arrest may resist, even to taking the life of the wrong-doer. Where the attempt, says Mr. Bishop, is to convey one by force beyond the reach of law, or to carry him out of the country, in such extreme cases the party would be justified in resisting to the death of his adversary.

In the present case the court below told the jury "that the arrest of the accused was unlawful, and that the latter had the right to resist the arrest by the use of such force, but only such force, as was necessary, or seemed to him (the defendant), in the exercise of a reasonable judgment, to be necessary to repel the force used by Wilson in attempting to arrest him; and if the jury believe from the evidence that the defendant, at the time he shot and killed Wilson, believed, and had reasonable grounds to believe, that he was then and there in immediate danger of losing his own life, or of great bodily harm at the hands of said Wilson, and that to shoot said Wilson was necessary, or seemed to the defendant, in the exercise of a reasonable judgment, to be necessary, to avert the danger, real or to him apparent, as before stated, the jury should find him not guilty."

Learned counsel for the defence, in response to the argument by the attorney for the State, insisted that his client had the right to use such

force, and no more, as was necessary to resist the arrest and prevent an unlawful imprisonment, and that the danger to life or the fear of great bodily harm should have been eliminated from the instruction. However persuasive his argument, and conceding that any other arrest and imprisonment than that which is in accordance with law and necessary for the ends of public justice is inconsistent with civil liberty, still the enjoyment of the absolute right of personal liberty cannot be asserted by taking the lives of those restraining its exercise, unless the attempt to prevent its enjoyment endangers the life of the citizen, or subjects him to great bodily harm.

The law has merely said to the citizen that, although your liberty has been restrained, you cannot deprive the aggressor of his life in order to regain it, unless you are in danger of losing your own life.

Such was the instruction given by the court below, and the accused having been found guilty of manslaughter only, we perceive no reason for disturbing the judgment, and the same is now affirmed.

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STATE *v.* SHERMAN.

SUPREME COURT OF RHODE ISLAND. 1889.

[*Reported* 16 *Rhode Island*, 631.]

DURFEE, C. J.[1] On trial in the Court of Common Pleas the complainant testified that, seeing the defendants tearing down the causeway, he ran to where said John P. Sherman was at work, and put his foot on a stone which said John P. was prying up with a crowbar; that said John P. raised the crowbar as if to strike him, whereupon he seized it in self-defence, and some one, he knew not who, knocked him down, and that said John P. twice threw him from the causeway into the water. His testimony was corroborated by other witnesses. On the other hand, said John P. testified that the complainant rushed down and seized him, that he never either struck or struck at him, but only pushed him away, using no more force than was necessary for self-protection, as the complainant repeatedly attacked him. Other witnesses corroborated him. He also testified that the open water at the end of the causeway was too shallow for him to pass without getting out of his boat and dragging it. After the case had been argued to the jury, he asked the court to instruct the jury as follows, to wit: "That a man in a public place, if attacked, may resist with his natural weapons, using no more force than is necessary, without retreating." The court refused, but did instruct them that in such a case a man must retreat, if he can safely, and that the defendant did not testify that there was anything to prevent his retreating. The defendant excepted

[1] Part of the opinion only is given.

to both the refusal and the instruction. The bill of exceptions sets forth that the complainant's counsel stated, in his argument to the jury, that he did not claim for the complainant the right to use any force to protect the causeway, or any force against the defendant, except such as he might lawfully use in any public place.

We think the court below erred. Generally a person wrongfully assailed cannot justify the killing of his assailant in mere self-defence, if he can safely avoid it by retreating. Retreat is not always obligatory, even to avoid killing; for if attack be made with deadly weapons, or with murderous or felonious intent, the assailed may stand his ground, and if need be kill his assailant. But there is no question of killing here, and we know of no case which holds that retreat is obligatory simply to avoid a conflict. Where there is no homicide the rule generally laid down is, that the assaulted person may defend himself, opposing force to force, using so much force as is necessary for his protection, and can be held to answer only for exceeding such degree. Mr. Bishop, in his work on Criminal Law, § 849, says: "The assailed person is not permitted to stand and kill his adversary, if there is a way of escape open to him, while yet he may repel force by force, and, within limits differing with the facts of the case, give back blow for blow." See, also, 1 Wharton's Criminal Law, § 99; Stephen's Digest Criminal Law, art. 200; May's Criminal Law, Students' Series, § 62. Mr. May's language is: "There seems to be no necessity for retreating or endeavoring to escape from the assailant before resorting to any means of self-defence short of those which threaten the assailant's life." In Commonwealth *v.* Drum, 58 Pa. 1, 21, 22, where the defendant, who was indicted for murder, set up that he acted in self-defence, the court in charging the jury used the following language: "The right to stand in self-defence without fleeing has been strongly asserted by the defence. It is certainly true that every citizen may rightfully traverse the street, or may stand in all proper places, and need not flee from every one who chooses to assail him. Without this our liberties would be worthless. But the law does not apply this right to homicide." There are cases, however, which manifest a disposition to apply the same rule generally. Runyan *v.* The State, 57 Ind. 80; Erwin *v.* State, 29 Ohio St. 186.

In Gallagher *v.* The State, 3 Minn. 270, the defendant was complained of for assault and battery, and set up in justification that he acted in self-defence, the complainant having stepped forward with his cane raised, as if about to strike. The lower court, on trial, ruled as follows: "Where a person is approached by another with a cane raised in a hostile manner, the former is not justified in striking unnecessarily, but is bound to retreat reasonably before striking." On error the Supreme Court held the ruling to be erroneous. "Such is not the law," say the court; "but the party thus assaulted may strike, or use a sufficient degree of force to prevent the intended blow, without retreating at all." The case is exactly in point. The exception is therefore sustained, and the cause will be remitted for a new trial.

5-60742

UHLEIN v. CROMACK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1872.

[*Reported* 109 *Mass.* 273.]

TORT for killing the plaintiff's dog.[1]

The defendant contended that he had a right to kill the dog, on the ground that it was a public nuisance, because it was a dangerous animal and accustomed to bite those who came near it; and that the plaintiff did not properly confine it; and evidence was offered on this point, and that the dog had previously bitten two persons, one of whom, while going upon the plaintiff's premises, over a fence in the rear of the kennel, to do some work for the plaintiff's family, came past the dog, and the other of whom was attacked some months before, on the public highway. The defendant also introduced evidence tending to show that the locality in which the plaintiff lived was quiet, and comparatively free from persons likely to trespass on the plaintiff's premises. The judge rules that these facts alone, if true, would not justify the defendant in killing the dog as he did, the statute specifying the method by which a dangerous dog might be killed, and the defendant not claiming to have acted under any authority conferred on him by the statute; and so instructed the jury, to which the defendant excepted. The jury, however, when they returned their verdict, at the request of the judge returned special findings, that the dog was a dangerous animal and accustomed to bite those who came near it, but that it was chained and confined so that all persons properly on the plaintiff's premises were in no danger from it.

CHAPMAN, C. J. By the common law, a dog is property, for an injury to which an action will lie. Wright *v.* Ramscot, 1 Saund. 84; 2 Bl. Com., 393. In this commonwealth the keeping of dogs is regulated by the Gen. Sts. c. 88, §§ 52 *et seq.*, and the St. of 1867, c. 130. The plaintiff kept his dog restrained in conformity with the statutes. Although the dog was a dangerous animal, and accustomed to bite those who came near it, yet, as it was confined, so that all persons properly on the plaintiff's premises were in no danger from it, and was otherwise kept according to law, and the defendant had not been attacked by it, the jury were properly instructed that the act of the defendant was not justifiable. They were also properly instructed that the plaintiff had a right thus to keep it for the protection of his family.[2]

Exceptions overruled.

[1] Part of the statement of facts is omitted. — ED.

[2] See McChesney *v.* Wilson, 132 Mich. 252. — ED.

BARFOOT v. REYNOLDS.

KING'S BENCH.

[*Reported* 2 *Str.* 953.]

TRESPASS, assault, and battery against Reynolds and Westwood. Reynolds pleaded *son assault:* and Westwood pleaded that he was servant to Reynolds, the other defendant, and that the plaintiff having assaulted his master in his presence, he in defense of his master struck the plaintiff. And on demurrer the plea was held ill, for the assault on the master might be over, and the servant cannot strike by way of revenge, but in order to prevent an injury; and the right way of pleading is, that the plaintiff would have beat the master, if the servant had not interposed, *prout ei bene licuit.* The plaintiff had judgment.

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1 East P. C. 289, 290. In all cases where a felonious attack is made, a servant or any other person present may lawfully interpose to prevent the mischief intended; and if death ensue, the party so interposing will be justified. Thus, in the instances of arson or burglary, a lodger may lawfully kill the assailant in the same manner as the owner himself might do. . . . But the case of third persons interfering in mutual combats or sudden affrays, except as mediators to preserve the peace, requires greater caution. . . . If A., a stranger, take part on a sudden with either B. or C. who are engaged together in an affray, wherein both are in the eye of the law blamable, although perhaps in different degrees; and afterwards kill either, although in the necessary defence of the other, it cannot be less than manslaughter; for he who thus officiously interferes without any previous knowledge of the merits of the dispute, not to preserve the peace but to partake in the broil, is himself highly culpable, — having less provocation to heat his blood than probably the parties themselves had who originally engaged in the dispute.[1]

[1] For the analogous case of a stranger interfering to rescue one who having been illegally arrested had nevertheless submitted, see Rex v. Tooley, 2 Ld. Ray. 1296; Hugget's Case, Kel. 59; Adey's Case, 1 Leach, 245; Steph. Dig. Cr. L. 372. — ED.

5 6 2 2 2

REGINA v. ROSE.

OXFORD ASSIZES. 1884.

[*Reported* 15 *Cox C. C.* 540.]

THE prisoner was indicted for the wilful murder of his father, John William Rose, at Witney, on the 27th day of September.

The material facts proved were as follows: The prisoner, a weakly young man of about twenty-two years of age, was at the time of the alleged murder living with his father, mother, and sisters at Witney. The father, who was a very powerful man, had recently taken to excessive drinking, and while in a state of intoxication was possessed with the idea that his wife was unfaithful to him. He had on more than one occasion threatened to take away her life, and so firmly impressed was she with the idea that these were no idle threats that the prisoner's mother had frequently concealed everything in the house which could be used as a weapon.

On the night in question the family retired to their bedrooms, which were situated adjoining to one another, about nine o'clock. The deceased man appears to have immediately commenced abusing and illtreating his wife, accusing her of unfaithfulness to him and threatening to murder her. On several occasions she retired for safety to her daughter's room; on the last occasion her husband pursued her, and seizing her dragged her towards the top of the stairs, threatening to push her down. He then said he would cut her throat, left her saying he was going to fetch the knife which all the family seem to have known was in his room, and then rushing back seized his wife, and forced her up against the balusters, holding her in such a position that the daughters seem to have thought he was actually cutting her throat. The daughters and mother shouted "Murder!" and the prisoner, running out of his room, found his father and mother in the position described. No evidence was given that the deceased man had any knife in his hand, and all the witnesses said that they did not see then or afterwards find his knife.

The prisoner fired one shot (according to his own account) to frighten his father, but no trace of any bullet could be found, and immediately after he fired another shot which, striking his father in the eye, lodged in the brain and caused his death in about twelve hours. On his arrest the prisoner said, "Father was murdering Mother. I shot on one side to frighten him; he would not leave her, so I shot him."

In cross-examination the deceased man's employer said that the prisoner's father was the strongest man he had ever seen, and the prisoner would not have had the slightest chance in a hand-to-hand encounter with him.

The defence set up was that the case was one of excusable homicide.

His LORDSHIP [LOPES, J.] in the course of his summing up said: Homicide is excusable if a person takes away the life of another in defending himself, if the fatal blow which takes away life is necessary for his preservation. The law says not only in self-defence such as I have described may homicide be excusable, but also it may be excusable if the fatal blow inflicted was necessary for the preservation of life. In the case of parent and child, if the parent has reason to believe that the life of a child is in imminent danger by reason of an assault by another person and that the only possible, fair, and reasonable means of saving the child's life is by doing something which will cause the death of that person, the law excuses that act. It is the same of a child with regard to a parent; it is the same in the case of husband and wife. Therefore I propose to lay the law before you in this form: If you think, having regard to the evidence and drawing fair and proper inferences from it, that the prisoner at the bar acted without vindictive feeling towards his father when he fired the shot, if you think that at the time he fired that shot he honestly believed and had reasonable grounds for the belief that his mother's life was in imminent peril, and that the fatal shot which he fired was absolutely necessary for the preservation of her life, then he ought to be excused, and the law will excuse him from the consequences of the homicide. If, however, on the other hand, you cannot come to that conclusion, if you think, and think without any reasonable doubt, that it is not a fair inference to be drawn from the evidence, but are clearly of opinion that he acted vindictively and had not such a belief as I have described to you, or had not reasonable grounds for such a belief, then you must find him guilty of murder.

Verdict, Not guilty.[1]

FLINT v. BRUCE.

563 F+2

SUPREME JUDICIAL COURT OF MAINE, 1878.

[*Reported* 68 *Me.* 183.]

APPLETON, C. J.[2] This is an action of trespass for an assault and battery upon the plaintiff by the defendant.

The evidence shows an affray between the defendant and A. L. Soule, the father of the plaintiff. The plaintiff interfered for the protection of her father, and to prevent the further continuance of the affray. A child has an unquestioned right to intervene for the protec-

[1] See Campbell v. Com., 88 Ky. 402. As to right of a U. S. marshal to defend a judge, see *In re* Neagle, 135 U. S. 1. — ED.

[2] Part of the opinion only is printed. — ED.

tion of a father upon whom an assault is being committed. The defendant committed the assault upon the plaintiff while acting in defense of her father. For this assault and the damages resulting therefrom the defendant is responsible to this plaintiff. . . .

5647242

TOMPKINS v. KNUT.

CIRCUIT COURT OF THE UNITED STATES, 1899.

[*Reported* 94 *Fed.* 956.]

EVANS, J. In the case of Oscanyan v. Arms Co., 103 U. S. 261, the trial court, after hearing the opening statement by plaintiff's counsel to the jury as to what facts were expected to be proved to support the plaintiff's case, and after verifying the accuracy of the statement, sustained a motion on behalf of defendant on that presentation of the case alone to instruct the jury to find a verdict against the plaintiff upon the ground that, if those statements were true, the contract sued upon was against public policy, and void. Upon a writ of error to the Supreme Court the proceeding was approved, and the judgment was affirmed. The plaintiff in this action for assault and battery and trespass has testified under oath, and stated the facts upon which he relies in support of his action, and the court is called upon to determine whether, assuming all the plaintiff says to be true, he is entitled to a verdict against the only defendant now remaining in the case, since the death of his wife, the former co-defendant, has abated the action as to her. As the plaintiff was a participant in the entire transaction out of which his action arose, and completely states his case, it is admissible and proper, I think, to bring this question up now, because it would not be competent for him by other witnesses to contradict what he says; and while, on this motion, his statements must be accepted as true in his behalf, they may also, for the reason indicated, be taken as true against him. It appears from his testimony that, having been employed by the defendant and his wife and her brother, the owners of the farms described in the pleadings, up to January 1, 1898, as a manager and overseer, his contract was soon afterwards renewed for the year 1898; that part of the agreement was that the plaintiff, besides his monthly wages, was to have the use of the house on the premises for occupation by himself and family, and also provisions for the support of them all; that on the 24th of January, 1898 (the defendant and wife having come to the farm on invitation of the plaintiff in the preceding December, and having remained there, and all parties having been

entirely friendly, up to January 24th), there was some dispute as to whether plaintiff was any longer wanted, or would be permitted to remain, as the employee of defendant and his wife; that on the succeeding day (January 25th), while the defendant was outside the house to the plaintiff's knowledge, who was also outside, the plaintiff was hastily informed that Mrs. Knut, or someone in the inside of the house, was removing the furniture, and putting his family out, whereupon the plaintiff hurriedly ran into the house, seized a Winchester repeating rifle, and, upon going into the room where the others were, among other things, said, "If they touch any more of my furniture I will kill every son of bitch who does it"; that the rifle was then cocked, and leveled, in the hands of the plaintiff, who also had upon him a revolver, and probably a dirk; that Mrs. Knut, while appealing to him to desist, took hold of the rifle, and while she had hold of it it was discharged; that the defendant also went into the room soon after plaintiff did, and there found his wife struggling with plaintiff, who was armed as indicated, and endeavoring in some way to control the direction of the pointing of the gun; that under these circumstances the defendant, with some persons present (none of whom except the plaintiff appear in any way to have been armed), overpowered plaintiff, bound his hands behind him, took from him his gun and pistol, removed him to the stable lot, and soon afterwards delivered him to a peace officer (a deputy sheriff) who happened to be at the house on other business, and that the plaintiff was then unbound and removed by the officer, accompanied by the defendant and one other person, to Owensboro, the county seat. It is claimed that a kodak picture was taken of some part of the scene, but it does not appear that defendant was concerned with that phase of the case, but that, if it was done by anybody, it was by his wife, now dead. It seems to the court that all parties were lawfully on the premises at the time, and that the whole case must turn, not upon the provisions of the contract, nor anybody's rights thereunder, but upon the facts immediately connected with the affray on January 25th. If this be correct, then the court, upon the plaintiff's own showing, is clearly of opinion that the defendant had reasonable grounds for believing, when he appeared upon the scene, that his wife was apparently in great jeopardy and danger of her life in her struggle with a man so thoroughly armed as was the plaintiff; that if the defendant had then been armed, and had taken the plaintiff's life, the law would have excused him; that if he might, in the then apparently necessary defense of his wife, have taken plaintiff's life, he was certainly excusable in doing for her protection, and probably his own, the lesser things of binding and disarming the plaintiff, so as to prevent further mischief until he could deliver plaintiff to a peace officer, precisely as he might be justified in binding a madman or a dangerous beast, who had as ample power to do mischief as this heavily-armed man had upon this occasion; and that it does not appear that defendant

used more force than was apparently necessary to prevent great bodily harm to his wife, and probably others. Whether plaintiff had any right to enforce his claims to the possession of defendant's premises by force of arms may well admit of doubt, as he was only defendant's employee, and not his tenant in the ordinary sense; and, if plaintiff had not such right, then he was a gross violator of the law in seeking to remedy his supposed wrongs in so violent a manner, and should take the consequences without complaint. Indeed, all things considered, the court is inclined to think that the plaintiff got off quite as well as he could have reasonably expected. Upon the facts stated under oath by the plaintiff, if the jury were to find a verdict in his favor the court would not permit it to stand. For the reasons thus briefly stated, the court will sustain the motion, and instruct the jury to find for the defendant.

WOOD v. STATE.

SUPREME COURT OF ALABAMA, 1900.

[*Reported* 128 *Ala.* 27.]

APPEAL from the Criminal Court of Jefferson.

Tried before the Hon. Samuel E. Greene.

Felix Wood, the appellant, and Marion Wood, together with four others, were jointly indicted for an assault with intent to murder one John A. Brooks. The appellant was convicted of the offense charged, and sentenced to the penitentiary for a term of ten years.

On the trial of the cause, it was shown that John A. Brooks, the person alleged to have been assaulted, was the conductor of a street car, which ran from Birmingham to East Lake, and that on the day before the offense charged was committed, John A. Brooks and Marion Wood, brother of the defendant Felix Wood, had a difficulty; and, on the day of the assault complained of, Marion Wood boarded the car upon which Brooks was conductor on Twenty-second Street in Birmingham, and that Felix Wood and the other person jointly indicted with him, boarded the car on Twenty-fourth Street, and they all went to East Lake on said car; that Felix Wood, when he boarded the car, carried a Winchester rifle with him, in a canvas case; that upon reaching East Lake, the defendant and the persons with him alighted from the car; that Marion Wood went up to Brooks, and, after a few words between them, Brooks and Marion Wood drew their pistols and began firing at each other. At this time defendant, Felix Wood, who

was standing some twenty-five or thirty feet away, and who had taken his rifle from its cover during the conversation between Marion Wood and Brooks, fired upon said Brooks with the rifle.

During the examination of John A. Brooks, as a witness for the State, he was asked the following question: "What did Marion Wood say to you, when he came to the rear of the car at East Lake?" The defendant objected to this question upon the ground that it called for irrelevant and immaterial evidence. The court overruled the objection, and defendant duly excepted. In answer to the question the witness stated that as Marion Wood came up to him he said to the witness: "I came to see you about what you did to me yesterday." Witness then further testified that at that time Marion Wood had his hand in his coat pocket, and that the witness stated to him: "If you want to talk to me, take your hand out of your pocket"; and that he saw what appeared to be and was a pistol in the hands of Marion Wood; that said Wood spoke in an ordinary tone of voice, and that as Felix Wood, the defendant, was twenty-five or thirty feet away, the witness could not say whether defendant heard what passed between them or not. The defendant then moved the court to exclude statement made by Marion Wood, as witness, upon the grounds that it was hearsay evidence, and irrelevant and immaterial evidence. The court overruled the motion, and defendant duly excepted.

Upon cross-examination of witness (Brooks) the defendant asked him several questions seeking to disclose the particulars of the previous difficulty between said Brooks and Marion Wood. To each of these questions the State objected; the court sustained the objection, and the defendants separately excepted to each of such rulings.

The testimony for the defendant tended to show that John A. Brooks fired upon Marion Wood without provocation; that the defendant, who was the brother of Marion Wood, but who knew nothing of the particulars of the controversy between him and said Brooks, fired his rifle when Brooks shot at his brother, but that he did not aim the rifle at Brooks and did not shoot until Brooks had quit shooting at his brother and shot at the defendant twice.

The defendant testified that the first thing he saw after his brother, Marion Wood, went up to Brooks, Brooks had pulled his pistol and was firing at his brother, who, at that time, had not made any demonstration towards Brooks; and that he, the defendant, did not hear any of the conversation between Brooks and his brother.

Upon the introduction of all the evidence the defendant requested the court to give the jury the following charges and the defendant severally excepted to the refusal to give each of them as asked:

"(1) If the jury believe from the evidence that the defendant, seeing his brother Marion Wood in a desperate encounter with Brooks, shot at Brooks for the purpose of defending his brother, without knowing the origin of the difficulty, the jury may consider these facts

in determining whether the defendant acted maliciously, premeditatedly, and deliberately or justifiably." "(2) If the jury believe all the evidence they cannot convict the defendant of an assault with intent to murder." "(3) The court charges the jury that defendant was not bound to inquire into the origin of the difficulty between his brother and Brooks, but had the right to act from appearances." "(4) The court charges the jury that defendant would not be guilty as charged in the indictment if when he fired his brother was apparently in danger of death or great bodily harm, at the hands of Brooks." "(5) If the jury have a reasonable doubt from the evidence of any one of the following propositions being true, they must acquit him of an assault with intent to murder: 1st. That the defendant acted maliciously. 2d. That he acted deliberately. 3d. That he acted with premeditation."

McCLELLAN, C. J. One who intervenes in a pending difficulty in behalf of a brother and takes the life of the other original combatant stands in the shoes of the brother in respect of fault in bringing on the difficulty, and he cannot defend upon the ground that his brother was in imminent and deadly peril and could not retreat, unless the latter could have defended upon that ground had he killed his assailant. Hence in such cases it is a material inquiry whether defendant's brother was at fault in bringing on the difficulty with the deceased, and the same doctrine obtains, of course, where the charge is assault with intent to murder; and as bearing upon this inquiry presented in the case at bar the court properly admitted the testimony of Brooks to the effect that Marion Wood approached him with his hand in his pocket and apparently on a pistol and said: "I came to see you about what you did to me yesterday." It is of no consequence that Felix Wood, the defendant, did not hear this remark and was not, when he intervened, aware of any fault on the part of Marion in bringing on the difficulty: He entered into the combat at his own peril. Gibson *v.* State, 91 Ala. 64; Whatley *v.* State, 91 Ala. 108; Karr *v.* State, 106 Ala. 1. Upon this principle, as well as for other considerations, charges 1, 3, and 4 were properly refused to the defendant. Moreover, the evidence referred to was clearly admissible upon the further grounds, first, that it was of the *res gestae* of the main fact; and, second, there was other evidence from which the jury might have found that the difficulty was the result of a conspiracy between Marion Wood, the defendant, and others to assault and kill Brooks.

The trial court did not err in excluding testimony going to the particulars of the previous difficulty between Brooks and Marion Wood. Stewart *v.* State, 78 Ala. 436.

Charge 5 was properly refused. It is not essential to a conviction of an assault with intent to murder that the defendant acted deliberately and with premeditation. Meredith *v.* State, 60 Ala. 441; Lawrence *v.* State, 84 Ala. 425; Welch *v.* State, 124 Ala. 41; Gilmore *v.* State, 126 Ala. 21.

The affirmative charge was of course properly refused to defendant, there being evidence tending to prove every averment of the indictment and the plea being "not guilty."

Affirmed.

569742

PEOPLE *v.* COOK.

SUPREME COURT OF MICHIGAN. 1878.

[*Reported* 39 *Michigan*, 236.]

MARSTON, J.[1] The respondent was tried upon an information charging him with having committed the crime of murder, and was convicted of manslaughter. The case comes here upon exceptions before sentence. The shooting of the deceased by respondent was not denied on the trial. The defence relied on was justifiable homicide, committed in order to prevent the abduction and seduction of respondent's sister by the deceased.

There is not a scintilla of evidence in the case to establish this defence, unless the fact that he had reason to believe that deceased was about to seduce and debauch his sister would be a justification.

It was said that the testimony given on the trial showed the reputation of the deceased for chastity was bad, of which fact the respondent had knowledge; that deceased had been arrested for the seduction of a Miss Briggs; that he had publicly stated in respondent's presence and hearing the manner in which he had seduced her; that while under such arrest he had stated that he wanted to seduce just one more girl, Sarah Cook, but this fact had not been brought to respondent's knowledge; that the night before the shooting deceased and Sarah Cook had been out together quite late; that on the morning of the shooting, respondent's sister, Sarah Cook, left the breakfast table and went over to the house of deceased; that she shortly afterwards returned, took her wearing apparel, and announced that she was going off with Batey, bade the family good-by, and said they might never see her again.

The defence claimed the farther fact to be that Sarah Cook at that time was under the influence of drugs, administered to her by deceased, in order to enable him to accomplish his purpose, and that the shooting was believed by the respondent to be necessary in order to prevent such a result.

Blackstone says the English law justifies a woman killing one who attempts to ravish her, and so too the husband or father may justify

[1] Part of the opinion only is given.

killing a man who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious but not the other. The principle, he says, which runs through all laws seems to be this; that where a crime in itself capital is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting. It is not claimed that any direct force was attempted in this case, but that the felony intended was to be accomplished by the assistance of drugs administered or to be administered, and that where the power of resistance is thus overcome, and advantage thereof taken to violate her person, the act would be rape, and for such purpose the law would conclusively presume that sufficient force was used, at the time intercourse took place, to so characterize the act. The present case, however, falls short of coming within the principles which would justify the taking of life. The utmost that can here be said is that the deceased had used and was likely to use fraudulent means, by administering drugs, to excite the passions, or overcome the resistance he otherwise would have been sure to encounter, in order to accomplish his purpose. So far as he had then gone, even conceding all that is claimed, fraudulent and not forcible means had been resorted to, which would not create that necessity for immediate action on the part of the accused, by the taking of life, to prevent an attempted forcible felony. Ample time and opportunity existed to enable the accused to resort to other available and adequate means to prevent the anticipated injury. The evil threatened could have been prevented by other means within the reach and power of the accused. There was no such immediate danger, nor would the facts warrant the apprehension of such immediate danger as would justify a resort to the means adopted.

5707 f 2

STATE v. MELTON.

SUPREME COURT OF MISSOURI, 1891.

[*Reported* 102 *Mo.* 683.]

MACFARLANE, J. Defendant was indicted under section 1263, Rev. St. 1879, for an assault with intent to kill. Evidence was offered tending to prove such assault, and by means thereof the assaulted party was seriously wounded on the head. Defendant was convicted, and appealed to this court.[1] . . .

Defendant asked the following instruction: "(1) The court instructs the jury that, although they may believe from the evidence that the defendant struck and wounded Swicegood, yet if it is further shown by the evidence that such striking and wounding were done for the pur-

[1] Part of the opinion is omitted. — ED.

pose of preventing the commission of a felony upon Irvin Melton, his brother, or preventing said Swicegood from doing said Irvin Melton some great bodily harm, they will return a verdict of not guilty" — which the court amended by adding thereto the following: "Unless you further find from the evidence that the said Irvin Melton sought or brought on the difficulty with said Swicegood." This amendment is complained of. There was evidence tending to prove that Irvin Melton, who was a brother of defendant, both sought and brought on the difficulty; in fact, the evidence tended strongly to prove that the two brothers went to the entertainment with the intention of creating a difficulty with Swicegood. The right to defend his brother was no greater than the brother's right to defend himself. Counsel, in support of his position that the court improperly amended the instruction, cites the recent authorities of this State, commencing with Partlow's Case, 90 Mo. 608, 4 S. W. Rep. 14, in which the question of self-defense in murder cases have been discussed, and insists that under these authorities he had a right to the instructions as asked. According to this contention, a party could provoke and bring on a difficulty, and, if afterwards hard pressed, could wound and injure his antagonist, and go free of punishment, on the ground of self-defense. The entire scope and meaning of these authorities are misapprehended. The cases cited were all trials for murder, and it was not held in these cases that self-defense, under the circumstances, acquitted the defendant of all crime, but simply cut down his offense from a higher to a lower degree of homicide. In the Gilmore Case, 95 Mo. 560, 8 S. W. Rep. 359, 912, the question is made so clear that any further consideration of it is useless. These cases have no application to assaults merely. The amendment of the instruction was proper. For the error in giving the first instruction the judgment is reversed and cause remanded. All concur.

ANONYMOUS.

57 L d 2

KING'S BENCH. 1506.

[*Reported Year Book*, 21 *H. VII.* 39, *pl.* 50.]

FINEUX, C. J. If one is in his house, and hears that such a one will come to his house to beat him, he may well assemble folk of his friends and neighbors to help him, and aid in the safeguard of his person; but if one were threatened that if he should come to such a market, or into such a place, he should there be beaten, in that case he could not assemble persons to help him go there in personal safety, for he need not go there, and he may have a remedy by surety of the peace.[1] But a man's

[1] See Succession of Irwin, 12 La. Ann. 676. — ED.

house is his castle and his defence, and where he has a peculiar right to stay, &c. And all the justices agreed that a servant may beat one in defence of his master. TREMAINE J., said that a servant may kill one in defence of his master's life, if he cannot otherwise save it. T. 14. H. 7. Tr. 246.

5-7 2(1) 4 2

COOPER'S CASE.

KING'S BENCH. 1639.

[*Reported Croke Car.* 544.]

COOPER being indicted in the county of Surrey of the murder of W. L. in Southwark with a spit, he pleaded not guilty; and upon his arraignment it appeared that the said Cooper, being a prisoner in the King's Bench, and lying in the house of one Anne Carricke, who kept a tavern in the Rules, the said W. L. at one of the clock in the night, assaulted the said house, and offered to break open the door, and brake a staple thereof, and swore he would enter the house and slit the nose of the said Anne Carricke, because she was a bawd, and kept a bawdy-house. And the said Cooper dissuading him from those courses, and reprehending him, he swore, that if he could enter he would cut the said Cooper's throat; and he brake a window in the lower room of the house, and thrust his rapier in at the window against the said Cooper, who in defence of the house and himself thrust the said W. L. into the eye, of which stroke he died.

The question was, whether this were within the statute of 24 Hen. 8, c. 5.

THE COURT was of opinion, that if it were true he brake the house with an intent to commit burglary, or to kill any therein, and a party within the house (although he be not the master, but a lodger or sojourner therein) kill him who made the assault and intended mischief to any in it, that it is not felony, but excusable by the said statute of 24 Hen. 8, c. 5, which was made in affirmance of the common law; wherefore the jury were appointed to consider of the circumstances of the fact; and they, being a substantial jury of Surrey, found the said Cooper not guilty upon this indictment; whereupon he was discharged.

5-7 2(2) 4 2

WILD'S CASE.

LIVERPOOL ASSIZES. 1837.

[*Reported* 2 *Lewin*, 214.]

THE prisoner was indicted for manslaughter.

It appeared that the deceased had entered the prisoner's house in his absence. The prisoner on returning home found him there, and desired

him to withdraw, but he refused to go. Upon this words arose between them, and the prisoner, becoming excited, proceeded to use force, and by a kick which he gave to the deceased, caused an injury which produced his death.

ALDERSON, B. A kick is not a justifiable mode of turning a man out of your house, though he be a trespasser. If a person becomes excited, and being so excited gives to another a kick, it is an unjustifiable act.

If the deceased would not have died but for the injury he received, the prisoner having unlawfully caused that injury, he is guilty of manslaughter.

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573 Ff2

STATE v. PATTERSON.

SUPREME COURT OF VERMONT. 1873.

[*Reported* 45 *Vermont*, 308.]

BARRETT, J.[1] It is not deemed needful for the purposes of this case, with reference to its future prosecution, to discuss specifically any other subject, except that of the dwelling-house being one's castle, as bearing upon his right to kill or to use deadly weapons in defence of it. This is presented in the third request in behalf of the respondent, which is, in the language used by Holroyd, J., in charging the jury in Meade's Case, *infra*, viz.: "The making of an attack upon a dwelling, and especially in the night, the law regards as equivalent to an assault on a man's person, for a man's house is his castle." The purpose of this request seems to have been to justify the killing with the gun, as a lawful mode and means of defending the castle, as well as the person within it. Looking to the state of the evidence, it is not altogether obvious what there was in the case to warrant its being claimed that the respondent killed Flanders as a means of defending himself or his castle. It was claimed in behalf of the prosecution, and the evidence given in that behalf showed that the gun was not fired at Flanders as a measure of force, to repel and prevent him from breaking into the house. Moreover, in the exceptions it is said: "The respondent testified that he fired to the ground, and the object in firing was, not to hit them, but to scare them away." The respondent seems not to have regarded it a case, or a conjuncture, in which it was needful or expedient to use a deadly weapon as a means of forceful resistance to meet and repel an assault on his house — whatever such assault in fact was — or to protect himself from any threatened or feared assault on his person. The gun, loaded with powder alone, would have served all the needs of the occasion, and of the exigency which the respondent supposed then to exist and to press upon him.

Nevertheless, the point was made by said third request. It was indi-

[1] Part of the opinion, not relating to the question of justification, has been omitted.

cated in the charge that the case State *v.* Hooker, 17 Vt. 670, was invoked in support of it, and it is cited in this court for the same purpose. That case professes to decide only the question involved in and presented by it, viz., whether it was criminal under the statute for the respondent to resist an officer in the service of civil process within his dwelling-house, such officer having unlawfully broken into the house for the purpose of making such service. The language of the opinion is to be interpreted with reference to the case and the question. That case in no respect involved the subject of the use of a deadly weapon with fatal effect in defence of the castle; and it is not to be supposed that the judge who drew up the opinion was undertaking to discuss or propound the law of that subject.

To come, then, to the subject as it is involved in this case under said third request. In Foster's Crown Law, 319, it is said, "The books say that a man's house is his castle for safety and repose to himself and family." In Cook's Case, Cro. Car. 537, an officer, with a *capias ad satisfaciendum*, went with other officers, for the purpose of executing the same, to the dwelling-house of the respondent, and, finding him within, demanded of him to open the door and suffer them to enter. He commanded them to depart, telling them they should not enter. Thereupon, they broke a window, and afterwards went to the door of the house and offered to force it open, and broke one of the hinges; whereupon Cook discharged his musket at the deceased and hit him, and he died of the wound. "After argument at the bar, all the justices, *seriatim*, delivered their opinions, that it was not murder, but manslaughter; the bailiff was slain in doing an unlawful act in seeking to break open the house to execute process for a subject, and every one is to defend his own house. Yet they all held it was manslaughter, for he might have resisted him without killing him; and when he saw and shot voluntarily at him, it was manslaughter."

That was one of the earliest cases, and was fully considered; and it has been cited in all the books on criminal law since its decision in 1640 (15th Car. I.), — with some incorrectness of statement, in 1 Hale P. C. 458, and in other books adopting Hale's text. This is in some measure rectified by a remark, 1 East P. C. 321, 322. See also Roscoe Cr. Ev. 758; also 1 Bishop Cr. L., § 858, n. 2 (5th ed.). It is to be specially noticed that what made it manslaughter was that in order to defend his castle, it was not necessary to kill the bailiff.

The same idea of necessity, in order to relieve the killing from being manslaughter, exists in the case of defending one's person, as stated in 1 Hawkins P. C. 113: "Homicide *se defendendo* seems to be when one who has no other possible means of preserving his life from one who combats him on a sudden quarrel, or of defending his person from one who attempts to beat him (especially if such attempt be made upon him in his own house) kills the person by whom he is reduced to such an inevitable necessity."

In a learned note in 2 Archb. Cr. L. 225, it is said: "But when it is

said that a man may rightfully use as much force as is necessary for the protection of his person and property, it should be recollected that this rule is subject to this most important modification, — that he shall not, except in extreme cases, endanger human life, or great bodily harm. . . . You can only kill to save life or limb, or prevent a great crime, or to accomplish a necessary public duty." It is, therefore, clear that if one man deliberately kills another to prevent a mere trespass on his property — whether that trespass could or could not otherwise be prevented — he is guilty of murder. If, indeed, he had at first used moderate force, and this had been returned with such violence that his own life was endangered, and then he killed from necessity, it would have been excusable homicide. Not because he could take life to save his property, but he might take the life of the assailant to save his own.

Harcourt's Case, 5 Eliz., stated 1 Hale P. C. 485, 486, shows that this doctrine is not new. "Harcourt, being in possession of the house by title, as it seems, A. endeavored to enter, and shot an arrow at them within the house, and Harcourt, from within, shot an arrow at those that would have entered, and killed one of the company. This was ruled manslaughter, and it was not *se defendendo*, because there was no danger of his life from them without." What was thus ruled is the key to the author's meaning in the next following paragraph of his book, which see.

The idea that is embodied in the expression that a man's house is his castle, is not that it is his property, and, as such, he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office, or his barn. The sense in which the house has a peculiar immunity is that it is sacred for the protection of his person and of his family. An assault on the house can be regarded as an assault on the person only in case the purpose of such assault be injury to the person of the occupant or members of his family, and, in order to accomplish this, the assailant attacks the castle in order to reach the inmates. In this view, it is said and settled that, in such case, the inmate need not flee from his house in order to escape from being injured by the assailant, but he may meet him at the threshold, and prevent him from breaking in by any means rendered necessary by the exigency; and upon the same ground and reason as one may defend himself from peril of life, or great bodily harm, by means fatal to the assailant, if rendered necessary by the exigency of the assault.

This is the meaning of what was said by Holroyd, J., in charging the jury in Meade's Case, 1 Lewin C. C. 184. Some exasperated sailors had ducked Meade, and were in the act of throwing him into the sea, when he was rescued by the police. As the gang were leaving, they threatened that they would come by night and pull his house down. In the middle of the night a great number came, making menacing demonstrations. Meade, under an apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which one of the

party was killed. Meade was indicted for murder. Upon that state of facts and evidence, the judge said to the jury: "A civil trespass will not excuse the firing of a pistol at a trespasser in sudden resentment or anger, &c. . . . But a man is not authorized to fire a pistol on every intrusion or invasion of his house. He ought, if he has reasonable opportunity, to endeavor to remove him without having recourse to the last extremity. But the making an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault on a man's person; for a man's house is his castle; and, therefore, in the eye of the law, it is equivalent to an assault; but no words or singing are equivalent to an assault; nor will they authorize an assault in return, &c. . . . There are cases where a person in heat of blood kills another, that the law does not deem it murder, but lowers the offence to manslaughter; as, where a party coming up by way of making an attack, and without there being any previous apprehension of danger, the party attacked, instead of having recourse to a more reasonable and less violent mode of averting it, having an opportunity so to do, fires on the impulse of the moment. In the present case, if you are of opinion that the prisoner was really attacked, and that the party were on the point of breaking in, or likely to do so, and execute the threats of the day before, he, perhaps, was justified in firing as he did. If you are of opinion that he intended to fire over and frighten, then the case is one of manslaughter and not of self-defence."

The sense in which one's house is his castle, and he may defend himself within it, is shown by what is said in 1 Hale P. C. 486, that "in case he is assaulted in his own house, he need not flee as far as he can, as in other cases of *se defendendo*, for he hath the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by flight." Now, set over against that what is said in 1 Russell, 662, and the true distinction between the house as property, on the one hand, and as castle for protection on the other, is very palpable, viz.: "If A., in defence of his house, kill B., a trespasser, who endeavors to make an entry upon it, it is, at least, common manslaughter, unless, indeed, there were danger of life;" p. 663. "But where the trespass is barely against the property of another, the law does not admit the force of the provocation as sufficient to warrant the owner in making use of a deadly or dangerous weapon; more particularly if such violence is used after the party has desisted from the trespass." In Carroll *v.* State, 23 Ala. 36, it is said: "The owner may resist the entry into his house, but he has no right to kill, unless it be rendered necessary in order to prevent a felonious destruction of his property, or to defend himself against loss of life, or great bodily harm." Cited 2 Bishop Crim. Law, § 707, 5th ed. That case impresses us differently from what it does the learned author, as indicated by his remark prefacing the citation.

As developing and illustrating the prevailing idea of the law as to what will justify homicide *se et sua defendendo*, it is not without inter-

est upon the point now under consideration, to advert to what is said upon the general subject. In McNally, 562, it is said: "The injured party may repel force by force in defence of his person, habitation, or property, against one who manifestly intendeth and endeavoreth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he findeth himself out of danger; and if in such conflict he happeneth to kill, such killing is justifiable." Wharton incorporates this into his work as text. The same is found in the older books. 1 Hale P. C. 485, 486; also in Foster's Crown Law, 273; 1 Russell, 667; and in other books, *ad lib.* But to apprehend this in its true scope and application, it is important to have in mind what is said in 1 Russell, 668: "The rule clearly extends only to cases of felony; for, if one come to beat another, or take his goods merely as a trespasser, though the owner may justify the beating of him so far as to make him desist, yet if he kill him, it is manslaughter. . . . No assault, however violent, will justify killing the assailant under a plea of necessity, unless there be a manifestation of felonious intent." See Archb. Crim. Law, 221, cited 9 C. & P. 24.

This covers the cases of statutory justification of homicide, both under our own, and under the English statutes, and, in principle, and in reason, it is in keeping with the common law as to *se defendendo*, in defining the scope of which in this respect, it is well laid down that, "before a person can avail himself of the defence that he used a weapon in defence of his life, it must appear that that defence was necessary to protect his own life, or to protect himself from such serious bodily harm as would give him reasonable apprehension that his life was in immediate danger." 1 Russell, 661.

The law of the subject, as given in the books thus cited and referred to, seems to have been adequately apprehended by the court, and, so far as we can judge from what is shown by the record before us, it was not administered erroneously or improperly in the trial, as against the respondent.

If it were to be assumed that the defence might legitimately claim that there was an assault on the house, with the intent either of taking the life of the respondent or doing to him great bodily harm, the respondent would be justified in using a deadly weapon, if it should be necessary in order to prevent the perpetration of such crime, or if, under the existing circumstances attending the emergency, the respondent had reason to believe, and was warranted in believing, and, in fact, did believe, that it was necessary in order to prevent the commission of such crime. In case the purpose of the assailant was to take life, or inflict great bodily harm, and the object of his attack (if there was such attack) upon the house was to get access to the inmate occupying the same, for such purpose, the same means might lawfully be used to prevent him from breaking in as might be used to prevent him from making the harmful assault upon the person, in case the parties were

met face to face in any other place. In either case the point of justification is that such use of fatal means was necessary in order to the rightful, effectual protection of the respondent, or his family, from the threatened or impending peril.

We have been led to this discussion and exposition of the law as to the defence of the dwelling-house, on account of the somewhat fragmentary and disjointed condition in which it is done up in the books and cases of criminal law, and for the purpose of rendering as explicit as we are able the views of this court on that subject, as it has been brought into question and debate in the case in hand. In this exposition, and in the views embodied in this opinion, all the members of the court concur.

The other subjects involved in grounds and points of defence, as shown by the bill of exceptions, and upon which the court gave instructions to the jury, do not seem to require discussion.

The verdict is set aside, and new trial granted.

5-78442

REEDER *v.* PURDY.

SUPREME COURT OF ILLINOIS, 1866.

[*Reported* 41 *Ill.* 279.]

LAWRENCE, J. These two cases, although separately tried, depend upon the same facts and present similar questions, and it will be more convenient to dispose of both in one opinion.

In October, 1862, Reeder, claiming to be the owner of a house occupied by Purdy and his wife, entered it, accompanied by the other appellants, for the purpose of taking possession. Purdy was not at home. Mrs. Purdy refused to leave, whereupon Reeder commenced putting the furniture out of doors. She resisted this, and he seized her and held her by the wrists, while Baker, one of the co-defendants, continued to remove the furniture. This was somewhat damaged, and some slight injury was done to the wrists of Mrs. Purdy by the force applied in holding her. The appellants finally abandoned their attempt to take possession and withdrew.

Two actions of trespass have been brought, one by Purdy alone, and one by Purdy and wife jointly. The declaration in the suit brought by Purdy contains three counts, the first being for the assault upon his wife, the second for the injury to the personal property, and the third for breaking his close and carrying off his furniture. The declaration in the suit of Purdy and wife contains two counts, both of which are for the assault upon the wife. There were pleas of not guilty, and an agreement that all defenses might be made under them. A verdict

for the plaintiff of $450 in one case, and $500 in the other, was returned by the jury, and a judgment was rendered upon it, from which the defendants appealed.

It is insisted by the appellants that Reeder, being the owner of the premises, had a right to enter, and to use such force as might be necessary to overcome any resistance, and that he cannot be made liable as a trespasser, although it is admitted he might have been compelled to restore to Purdy, through an action of forcible entry and detainer, the possession thus forcibly taken. The court below instructed otherwise, and this ruling of the court is assigned for error.

We should not consider the question one of much difficulty, were it not for the contradictory decisions in regard to it, and we must admit that the current of authorities, up to a comparatively recent period, is adverse to what we are convinced must be declared to be the law of the State. But the rule cannot be said to have been firmly or authoritatively settled even in England, for Erskine, J., observes in Newton *v.* Harland, 1 Man. & Gr. 644 (39 E. C. L. 581), that "it was remarkable a question so likely to arise, should never have been directly brought before any court *in banc* until that case." This was in the year 1840, and all the cases prior to that time, in which it was held that the owner in fee could enter with a strong hand, without rendering himself liable to an action of trespass, seem to have been merely at *nisi prius*, like the oft-quoted case of Taunton *v.* Costar, 7 T. R. 431. Still this was the general language of the books. But the point had never received such an adjudication as to pass into established and incontrovertible law, and a contrary rule was held by Lord Lyndhurst in Hilary *v.* Gay, 6 C. & P. & 284 (25 E. C. L. 398). But in Newton *v.* Harland, already referred to, the Court of Common Pleas gave the question mature consideration, and finally held, after two arguments, that a landlord who should enter and expel by force a tenant holding over after expiration of his term, would render himself liable to an action for damages. But the later case of Meriton *v.* Combs, 67 E. C. L. 788, seems to recognize the opposite rule, and we must, therefore, regard a question which one would expect to find among the most firmly settled in the law as still among the controverted points of Westminster Hall.

In our own country there is the same conflict of authorities. In New York it has been uniformly held, that, under a plea of *liberum tenementum*, the landlord, who has only used such force as might be necessary to expel a tenant holding over, would be protected against an action for damages. Hyatt *v.* Wood, 4 Johns. 150, and Ives *v.* Ives, 13 Id. 235. In Jackson *v.* Farmer, 9 Wend. 201, the court, while recognizing the rule as law, characterize it as "harsh, and tending to the public disturbance and individual conflict." Kent, in his Commentaries, states the principle in the same manner, but in the later editions of the work, reference is made by the learned editor, in a note, to the case of Newton *v.* Harland, above quoted, as laying down "the most sound and

salutary doctrine." In Tribble *v.* Trance, 7 J. J. Marsh. 598, the court held, that, notwithstanding the Kentucky statute of forcible entry and detainer, the owner of the fee, having a right of entry, may use such force as may be necessary to overcome resistance, and protect himself against an action of trespass, under a plea of *liberum tenementum*. On the other hand, the Supreme Court of Massachusetts has held, that, although trespass *quare clausum* may not lie, yet, in an action of trespass for assault and battery, the landlord must respond in damages, if he has used force to dispossess a tenant holding over. The court say "he may make use of force to defend his lawful possession, but being dispossessed, he has no right to recover possession by force, and by a breach of the peace." Sampson *v.* Henry, 11 Pick. 379. See also Ellis *v.* Page, 1 id. 43; Sampson *v.* Henry, 13 id. 36; Meader *v.* Stone, 7 Metc. 147, and Moore *v.* Boyd, 24 Maine, 242. But by far the most able and exhaustive discussion that this question has received, was in the case of Dustin *v.* Cowdry, 23 Vt. 635, in which Mr. Justice Redfield, delivering the opinion of the court, shows, by a train of reasoning which compels conviction, that, in cases of this character, the action of trespass will lie. And he also says: "whether the action should be trespass *quare clausum*, or assault and battery, is immaterial, as under this declaration, if the defendant had pleaded soil and freehold, as some of the cases hold, the plaintiff might have new assigned the trespass to the person of the plaintiff, and a jury, under proper instructions, would have given much the same damages, and upon the same evidence, in whatever form the declaration is drawn." The case of Massey *v.* Scott, 32 Vt., cited as inconsistent with this case, does not in fact conflict with it. It only holds, that trespass *quare clausum* will not lie in behalf of a tenant for an entry not within the statute of forcible entry and detainer.

In this conflict of authorities we must adopt that rule which, in our judgment, rests upon the sounder reason. We cannot hesitate, and were it not for the adverse decision of courts, which all lawyers regard with profound respect, we should not deem the question obscured by a reasonable doubt. The reasoning upon which we rest our conclusion lies in the briefest compass, and is hardly more than a simple syllogism. The statute of forcible entry and detainer, not in terms, but by necessary construction, forbids a forcible entry, even by the owner, upon the actual possession of another. Such entry is, therefore, unlawful. If unlawful it is a trespass, and an action for the trespass must necessarily lie. It is urged that the only remedy is that given by the statute — an action for the recovery of the possession. But the law could not expel him who has entered if his entry was a lawful entry, and if not lawful all the consequences of an unlawful act must attach to it. The law is not so far beneath the dignity of a scientific and harmonious system that its tribunals must hold in one form of action a particular act to be so illegal that immediate restitution must be made at the

costs of the transgressor, and in another form of action that the same act was perfectly legal, and only the exercise of an acknowledged right.

It is urged that the owner of real estate has a right to enter upon and enjoy his own property. Undoubtedly, if he can do so without a forcible disturbance of the possession of another; but the peace and good order of society require that he shall not be permitted to enter against the will of the occupant, and hence the common law right to use all necessary force has been taken away. He may be wrongfully kept out of possession, but he cannot be permitted to take the law into his own hands and redress his own wrongs. The remedy must be sought through those peaceful agencies which a civilized community provides for all its members. A contrary rule befits only that condition of society in which the principle is recognized that

> He may take who has the power,
> And he may keep who can.

If the right to use force be once admitted, it must necessarily follow as a logical sequence, that so much may be used as shall be necessary to overcome resistance, even to the taking of human life. The wisdom of confining men to peaceful remedies for the recovery of a lost possession is well expressed by Blackstone, book 4, p. 148: "An eighth offense," he says, "against the public peace, is that of a forcible entry and detainer, which is committed by violently taking or keeping possession of lands and tenements with menaces, force and arms, and without the authority of law. This was formerly allowable to every person disseized or turned out of possession, unless his entry was taken away or barred by his own neglect or other circumstances, which were explained more at length in a former book. But this being found very prejudicial to the public peace, it was thought necessary, by several statutes, to restrain all persons from the use of such violent methods, even of doing themselves justice, and much more if they have no justice in their claim. So that the entry now allowed by law is a peaceable one; that forbidden, is such as is carried on with force, violence and unusual weapons." In this State, it has been constantly held that any entry is forcible, within the meaning of this law, that is made against the will of the occupant.

We state, then, after a full examination of this subject, that in our opinion the statutes of forcible entry and detainer should be construed as taking away the previous common law right of forcible entry by the owner, and that such entry must be therefore held illegal in all forms of action.

There are, however, some minor points upon which both of these judgments must be reversed.[1]

[1] The remainder of the opinion is omitted. —ED.

5-82 742

SULLIVAN *v.* OLD COLONY RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1888.

[*Reported* 148 *Mass.* 119.]

MORTON, C. J. The plaintiff was a passenger upon the defendant's railroad, having a ticket which entitled him to be carried from Boston to his home in Randolph. It appeared at the trial that he was drunk and disorderly, using indecent language, to the annoyance of the other passengers; that he was requested to be quiet and refused; and thereupon the officers of the defendant, who were also railroad police officers, not intending to arrest him, but to remove him, so as to protect the other passengers from annoyance, removed him from the cars to the platform of the depot at an intermediate station, and carried him along the platform to the baggage car, which was the third car forward of the car in which he had been riding, using only reasonable force; and that he rode in the baggage car to Holbrook, a station near his home in Randolph, without attempting or expressing any desire to leave the train.

It is clear that, under these circumstances, it was the right and duty of the defendant's officers to protect the other passengers by removing the plaintiff from the car in which he was riding. Vinton *v.* Middlesex Railroad, 11 Allen, 304. They might have left him at the place where he was removed, and if, after being removed, he had demanded to be released, or had refused to enter the baggage car, it would present a different question; but he did neither, and the act of putting him in the baggage car was done in kindness to him, for the purpose of carrying him to his home, which the jury may well have found to have been reasonable and proper, and not to have been an assault or imprisonment.

The principal contention of the plaintiff is, that they had no right to remove him except by arresting him under § 18, c. 103, of the Public Statutes. This statute, which provides that railroad police officers may arrest a noisy or disorderly passenger without a warrant, and remove him to the baggage or other suitable car, and confine him there until the train arrives at some station where such passenger can be placed in charge of an officer, who shall take him to a place of lawful detention, was intended to confer additional powers upon officers of the railroad who are appointed railroad police officers, and not to take away the common law right of the railroad corporation, by its servants or agents, to remove a passenger who is noisy and disorderly to the annoyance of the other passengers. Beckwith *v.* Cheshire Railroad, 143 Mass. 68.

In the case at bar, the court properly refused to instruct the jury, as requested by the plaintiff, that the defendant had no legal right to remove the plaintiff in the manner set out in the evidence. And the instructions given were sufficiently favorable to the plaintiff.

Exceptions overruled.

583.C11 Ld2

HUNT v. CASKEY.

SUPREME COURT OF NEW JERSEY, 1905.

[*Reported* 60 *Atl. Rep.* 42.]

PER CURIAM. This is an action for damages for assault and battery. At the time of the occurrence the defendant was secretary and treasurer, and also executive officer, of the Hunt Penworks, in Camden. The plaintiff had formerly been the president of that concern, but had been removed from that position for improper conduct which was prejudicial to the company's interests. He was on the company's premises at the time of the assault, apparently for the purpose of surreptitiously acquiring information with relation to its operations. He was ordered to leave the premises by the defendant, and, upon his refusal to leave, the assault was committed. The evidence makes it quite plain that the plaintiff was quite severely beaten, and that the assault was without legal justification, the force used being greatly in excess of that which was necessary to be exerted in order to eject him from the premises. For this reason a verdict in his favor was properly rendered.

The amount of the recovery ($3,000), however, was, in our judgment, excessive. If the plaintiff will consent to have the verdict reduced to $1,000, he may enter judgment for this amount; otherwise the rule to show cause will be made absolute.

583(2) Ld2

YODER v. YODER.

SUPREME COURT OF PENNSYLVANIA, 1913.

[*Reported* 239 *Pa.* 12.]

POTTER, J. Under the charge of the court in this case, the verdict of the jury must be accepted as establishing the fact that the defendant did not direct the arrest of the plaintiff, but merely directed the

officers to remove him from the hotel owned by the defendant, and in and about which the plaintiff had been engaged as an employee of the defendant. The record shows testimony clearly sufficient to sustain a finding by the jury that, after defendant had repeatedly demanded of plaintiff that he should obey his orders, and had received no satisfactory reply, he ordered plaintiff from the building, and the latter refused to go, before the officers were sent for and instructed to take him out. In this action the defendant was within his right. He was the owner of the hotel, and under the agreement with plaintiff the latter acquired no interest in the property but had only an interest in the profits arising from the business. As owner, the defendant had the right to order plaintiff from the premises, and in case of refusal had the right to remove him by force, if necessary. He pursued the course which was commended by this court in Sloan *v.* Schomaker, 136 Pa. 382, where it was said (p. 390), that when the plaintiffs were ordered from defendant's store, "it was their legal duty to go. In strict law defendant might then have used sufficient force to put them out with his own hands. Instead of doing so, he adopted the prudent and commendable course of sending for an officer." The case is no better for the plaintiff if he be regarded as being at the time in the service of the defendant, for even then it was his legal duty to go, when ordered to leave. If the order amounted to a wrongful discharge, he had his remedy by suit for damages for breach of the contract of employment, as in Allen *v.* Colliery Engineers Co., 196 Pa. 512, and Coates *v.* Steel Co., 234 Pa. 199. The issue of fact involved as to the terms of the order given by the defendant to the officers was fully and fairly submitted to the jury by the trial judge. They have found as a fact that the defendant did not go beyond ordering the officers to remove the plaintiff from the premises.

The assignments of error are overruled, and the judgment is affirmed.

5-84 442

BAILEY *v.* PEOPLE.

SUPREME COURT OF COLORADO, 1913.

[*Reported* 54 *Colo.* 337.]

SCOTT, J. Joseph E. Bailey, defendant in error, was convicted in the district court of the city and county of Denver, on the charge of the murder of Eugene H. Smith. The verdict was that of murder in the first degree. The wife of Smith was a sister of the defendant Bailey. The homicide occurred on the 18th day of July, 1910. It appears that because of a quarrel between Smith and his wife, and of the violent beating and abuse of her by Smith on the 15th day of July, the wife

with her two children left home and took refuge with her mother at the house where the defendant and his wife resided. This seems to have been but one of many similar occurrences.

At about ten o'clock on the evening of the 18th, Smith called over the telephone demanding that he be permitted to talk with his wife, which was refused by the mother who answered the telephone, whereupon Smith replied with vile and abusive language, which caused the mother to hang up the receiver. About fifteen minutes after this, Mrs. Smith's little boy, by a former marriage, who was in the yard for the purpose of sleeping there, and who had heard his grandmother talk over the telephone, came running into the house and shouted to his mother that he, meaning Smith, was coming. It seems that all of the occupants of the house had at this time retired, or were in the act of retiring. Upon hearing the boy's cry, Mrs. Smith ran into the bedroom occupied by the defendant and his wife, and called to him.

Mrs. Smith's testimony upon this point is in substance as follows:

"I looked out of the window, looked northward; I was undressed to go to bed; he was under the arc lights. He was almost running. He was just plunging, just coming in a jump like that (indicating). It frightened me so; I could see from his appearance that he was in a very angry, bad mood, and I ran to my brother's bedroom door and called to him that there he came. I said to my brother: 'Get up out of bed, yes, there he comes,' and I said, 'For God's sake, don't let him come in here; if you do he will kill the whole family — he will kill mother and me.'"

The defendant thereupon arose from his bed, secured a revolver and called out to Smith through the window, demanding that he should not come into the yard. He then went from his bedroom into a room from which a door opened upon a porch, and upon which Smith was entering. The defendant called to Smith, it appears four times, and demanded that he should not come in. In reply to either the first or second request Smith said, "I will come in and get the whole God damned push of you."

Smith finally opened the screen door as if coming in, when the defendant said, "I tell you for God's sake don't try to enter this side porch or the house; if you do I will shoot you." About this time the defendant fired the shot that resulted in the death of Smith. The defendant was crippled in his right hand from an injury recently sustained, and was compelled to use the revolver with his left hand. Smith was a very large and powerful man, much larger than the defendant.

It appears that earlier in the day R. L. McDonald, a brother-in-law, at the request of Mrs. Smith, went to Smith to see if an adjustment of their trouble could not be had, and at which time Smith said, "Well, if she will come back and live with me and do just as I say, I will live with her, and if she won't, God damn her, I will kill her."

A witness named Tyler, who was at the time living at the house of

the Smiths', also testified that, "On the morning of the shooting, Smith showed me a gun and said, 'It was a God damn good thing you got me drunk last night, or I would have gone down and cleaned out the whole God damn push.' Smith came home on the morning of the 18th of July (the day of the shooting) about two o'clock. He had been drinking. He came into my room and raised a fuss with me; struck me and used — (the witness repeats vile language of deceased towards him). I had a thirty-eight revolver under my pillow; I drawed the gun on him and stood back on the opposite side of the bed until I could get down the stairway, and when I got down the stairway, I got out and stayed out the rest of the night. Mrs. Smith wasn't there; just I and Smith."

There are many assignments of error, but in as much as the case must be reversed by reason of certain prejudicial instructions given, it will not be necessary to consider other assignments.

The court, over the objection of the defendant, gave instructions Nos. 10 and 21, which are so clearly erroneous and prejudicial to the rights of the defendant, and are so closely connected in their subject matter as to make it convenient to consider them together. These in full are as follows:

"No. 10. That if you believe from the evidence, that the deceased, Eugene H. Smith, attempted to enter the house of Joseph E. Bailey or his mother, wherein he resided, and that at the time he attempted to enter the same he feloniously intended to assault or kill any of the inmates thereof, then you are instructed that the doctrine that every man's house is his own castle, would apply, and the defendant Joseph E. Bailey is not required under the law to retreat from the position or stand which he had taken; but upon the other hand, if you believe that the said Smith attempted to enter the said house for the purpose of conversing with and inducing his wife to leave the said house, or for the purpose of using physical force, in endeavoring to do so, and had no intention of injuring or attempting to injure any of the inmates of the said house further than to exercise a reasonable supervision and control over his wife and her conduct, then you are instructed that there is no self-defense in this case, and no justifiable killing, and the said Joseph Bailey's killing of the deceased was unlawful, unless you believe from the evidence, that the circumstances attending the entry into the house was of such a character as would lead a reasonable man under like circumstances to believe that he or the inmates of the said house were about to receive great bodily injury."

"No. 21. The court instructs the jury: That the deceased, Eugene H. Smith, as the husband of the sister of the defendant, Joseph E. Bailey, had a right to exercise such reasonable control over her as was necessary to conduce to the proper establishment and maintenance of his household as the head of a family; and as such husband had a right to enter, in a lawful manner, the house or houses of any person

whomsoever, for the purpose of talking with and procuring his said wife to leave the said house, if he so desired, and had a right to use such reasonable force and persuasion as was necessary to induce her to leave the house of her mother and come back to her home with him; and no person, not even her brother, Joseph E. Bailey, had a right to interfere with him in the exercise of such reasonable force or persuasion; and if you believe from the evidence, beyond a reasonable doubt, that the deceased, Eugene H. Smith, left his home on the evening of July 18th, and after telephoning to the house of Mrs. Bailey, went there for the purpose of seeing his wife and talking with her and endeavoring to persuade and induce her to leave the house of the said Mrs. Bailey, her mother, or to talk over their family affairs and difficulties, and that he had no intention to inflict bodily harm or injury upon the persons in said house, then you are instructed that there is no self-defense in this case and no justification for the killing of the said Eugene H. Smith by the said Joseph E. Bailey."

These instructions not only announce such palpable misstatements of the law as to prejudice the rights of the defendant, but go to the extent of proclaiming a doctrine concerning the relation of husband and wife as to appear nothing less than monstrous at this period of our civilization.

The jury are here told that in order that the doctrine of self-defense may apply, they must believe from the evidence that Smith attempted to enter the house of defendant, and also that at that time he feloniously intended to assault or kill any of the inmates. This is not the law. It is not the state of the mind of the defendant alone which the jury are to consider, but of the deceased as well. That is to say, what the defendant believed, or what under all the circumstances he might have reasonable cause to believe to be the intention of the defendant.

These instructions are the equivalent of a denial of the very right of self-defense as defined and provided by our statutes. Sec. 1632, Revised Statutes, 1908, provides: .

"Justifiable homicide is the killing of a human being in necessary self-defense or in the defense of habitation, property or person against one who manifestly intends or endeavors by violence or surprise to commit a known felony, such as murder, rape, robbery, burglary and the like, upon either person or property, or against any person or persons who manifestly intend and endeavor in a violent, riotous or tumultuous manner to enter the habitation of another for the purpose of assaulting or offering personal violence to any person, dwelling or being therein."

The evidence clearly justified the submission to the jury of the question as to whether or not the deceased was a person who manifestly intended and endeavored in a violent, riotous, or tumultuous manner to enter the habitation of the defendant for the purpose of assaulting or offering personal violence to any person dwelling or being therein.

Instruction No. 21, without qualification, declares in substance that a husband without warrant of authority, and over the protest of the occupant, has a right to enter the house or houses of any person whomsoever, for the purpose of talking with, and procuring his wife, and against her will, to leave such house if he so desires.

This is not now and never was the law in this country. It is a repudiation of every reasonable conception of the law of domicile and the right of habitation. Neither a husband nor any other person has such right. It strikes at the very foundation and sanctity of home life. It gives license to every drunken vagabond, or other evil person, to invade the privacy of every man's home. It would destroy the moral, constitutional, statutory, and common law right of defense of habitation.

It is true the instruction declares the entrance must be in a lawful manner. But there can be no such thing as lawful entrance under such circumstances.

But the part of the paragraph of the instruction following is even more shocking. Here the jury are told that a husband may over the protest of the occupant of the house, and over the protest of the wife of the husband so entering, not only enter any man's house, but has a right also to use such reasonable force and persuasion as may be necessary to cause the wife to leave the house of his mother and come back to his home with him, and that no person, not even her brother, has a right to interfere with him in the exercise of such reasonable force or persuasion.

The use of the word "force" in connection with the word persuasion can refer to physical force only, and the extent of this force is thus limited only by the necessity of the case, in order to so secure the possession, control, and abduction of the person of the wife, and all this as against her will, her fear, and even the apparent danger of her life.

In other words, if this be the law, whatever may be the circumstances, the defendant was absolutely without right to defend his home and his near relatives from the threatened assaults and brutality of an infuriated and drunken husband, at whose will the home is to be made the place of riot and the occupants to suffer mental distress, probable assault, and as indicated by the testimony in this case, possible murder.

Such is not and can never be the law in a civilized country.

This assertion of the right of a husband to control the acts and will of his wife by physical force cannot be tolerated.

The prejudicial effect on the defendant's rights by these instructions is too palpable to require comment.

Counsel for defendant in their very excellent brief have cited many cases bearing upon this question. Among these is that of the English case of Queen v. Jackson, Div. 1, 1891. This was a case where a husband undertook to restrain the liberty of his wife by forcibly keeping her in his own home after she had declined to further live with him. The decision

of the court in that case may be epitomized in the statement of Mr. Helmer Collins, Q. C., as follows:

"The contention of the husband would result in the re-introduction into society of private war; for the male relations of a wife would naturally, if at hand, be likely to resist her capture by the husband. The contention for the husband involves wholly untenable propositions. First, it involves that the husband may take possession of the wife's person by force, though no process of law could give him such possession of her. There never was any process of law for seizing and handing over the wife to the husband." . . .

"A husband has no such right at common law to the custody of his wife. It is inconceivable that the husband should be entitled to do by force for himself that which the law cannot enforce in his favor."

In Fulgham *v.* State, 46 Ala. 143, the rule is stated as follows:

"But in person, the wife is entitled to the same protection of the law that the husband can invoke for himself. She is a citizen of the State, and is entitled, in person and in property, to the fullest protection of the laws. Her sex does not degrade her below the rank of the highest in the Commonwealth."

In State *v.* Oliver, 70 N. C. 44, it is said:

"We may assume that the old doctrine that a husband had a right to whip his wife, provided he used a switch no larger than his thumb, is not law in North Carolina. Indeed, the courts have advanced from that barbarism until they have reached the position that the husband has no right to chastise his wife under any circumstances."

Again, in Buckingham *v.* Buckingham, 81 Mich. 89, the same doctrine is declared:

"There would seem to be no legal principle which would prevent her from voluntarily deserting her husband, and abandoning her homestead. She is in no sense the slave of her husband, and is so far the master of her own will that she has liberty to remain with her husband, or go from him, as she pleases; and he has no legal remedy to compel her to return."

In State *v.* Connolly, 3 Ore. 69, the principle is stated as follows:

"If Mrs. Hill, the wife of the deceased, having reasonable ground to apprehend personal violence at the hands of her husband, sought a temporary refuge in the defendant's house, and the deceased, being forbidden, sought to enter, then either the defendant or his wife had a right to use all necessary force to prevent him from entering."

And in Commonwealth *v.* McAfee, 108 Mass. 459, we find a very clear and comprehensive statement of the rule:

"It may be stated, however, that under modern legislation, as well as judicial opinions, that fiction of legal unity by which the separate existence of the wife in a legal sense is denied is exploded. Her person is as sacred as that of the husband, and the protection afforded by law to the one should not be denied to the other. In fact, courts of equity

have always recognized the separate existence of the wife in reference to her sole and separate estate, and to say that a court of law will recognize in the husband the power to compel his wife to obey his wishes, by force if necessary, is a relic of barbarism that has no place in an enlightened civilization." [1] . . .

The judgment is reversed, and the case remanded.[2]

590882

COMMONWEALTH v. DOUGHERTY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1871.

[*Reported* 107 *Mass.* 243.]

Two complaints to the district court of central Berkshire, for assault and battery of John McCarthy; the first offense averred to have been committed in a church building, and the second in a burial ground. The defendant was found guilty on both, and appealed. At the trial of the first complaint, in the Superior Court, on the appeal, before *Reed*, J., there was evidence of these facts:

The defendant was sexton of the Roman Catholic church building in Pittsfield, and in that capacity had charge of the building and of the conduct of funerals in it. He was also an undertaker. It was the rule concerning funerals in the building, that the priest or the sexton should be informed of the death, and of the desire of the friends of the deceased that funeral services should be performed there; upon receiving such notice, either the priest or the sexton would fix a time for such services, to avoid interference with the other exercises of the church; and it was the sexton's duty to take charge of the funeral procession, when it reached the door of the building, and to precede the bearers of the corpse up the aisle, superintend the deposit of the bier in the place provided for it, seat the mourners, and then, if the priest was not present, call him.

On Sunday, May 17, 1870, at the close of a religious service in the building, and after the congregation had been dismissed, but while some of them were lingering at prayer within the building, John McCarthy, an undertaker who had recently set up in business in Pittsfield, came to the building in charge of a funeral of which no previous notice had been given, and attempted to enter and perform the duties of the sexton in regard to it. Upon McCarthy's arrival at the vestibule, the defendant, who was seated at a desk within the door, forbade him to proceed with the funeral in the building. But Mc-

[1] Part of the opinion is omitted.'— ED.

[2] See State v. Sinclair, 250 Mo. 278, 157 S. W. 339. — ED.

Carthy persisted in his attempt, marched up the aisle with his procession, and was directing one Tim Powers where to put the bier, when the defendant "came down the aisle, and told him to go out of the church, and forcibly removed him, but without more force than was necessary to eject him from the building."

Upon these facts the defendant requested a ruling that he was entitled to an acquittal, which the judge refused, whereupon by consent of the defendant a verdict of guilty was returned and the case reported for the revision of this court.

MORTON, J. It appeared at the trial, that the defendant was the sexton and person in charge of the church, and that it was his duty to take charge of and conduct funerals at the church. The complainant McCarthy had no right to insist upon conducting a funeral there in violation of the rules prescribed by the authorities of the church to maintain order and prevent interference with other religious exercises. The facts show that he did so, and that, upon being requested to desist and leave the church, he refused, and persisted in his unauthorized intrusion. We think the defendant, being in charge of the church, upon such refusal, had a right to remove him; and as the facts find that in so doing he used no more force than was necessary, he was not guilty of an assault and battery. The jury should have been instructed, as requested by the defendant, that upon the facts shown at the trial he was entitled to an acquittal.

Verdict set aside.

At the trial of the second complaint, in the Superior Court, also before *Reed*, J., the following facts appeared:

The fee of the Roman Catholic burial ground in Pittsfield was in Edward H. Purcell, the pastor of the church of St. Joseph in Pittsfield; and he had established certain rules for its use, the tenth and eleventh of which were as follows:

"Tenth. The conduct and charge of all funeral processions and gatherings of persons in and upon the grounds of said cemetery shall be in the person appointed for that purpose by the pastor of the church of St. Joseph in Pittsfield, and strict obedience to his requirements is demanded and will be enforced.

"Eleventh. Undertakers, and all other persons having charge of a funeral or burial, before entering upon the cemetery grounds, will notify the person in charge of the cemetery of the time such burial will occur. In the cemetery all arrangements therefor will be made, and the charge of such funeral received at the entrance of said cemetery, and no undertaker or other person than the pastor or his appointees will be permitted to officiate in any way or matter upon the grounds."

The defendant was the person appointed by Father Purcell under the tenth rule, and had charge of the burial ground.

Licenses for lots were granted by Father Purcell in a form certifying

that the licensee was entitled to the use of one burial lot of specified dimensions, subject to the rules for the use of the burial ground, and on condition that persons dying drunk or unbaptized, or otherwise opposed to the Catholic Church in the opinion of the Roman Catholic bishop of Boston, should not be entitled to observance of the license.

At the funeral (described in the first case) which the undertaker McCarthy was conducting, he "entered the burial ground with the corpse, under this usual license, and there conducted the funeral ceremonies, and, as is usual on such occasions with Roman Catholics, gave thanks and made prayers at the close." As McCarthy was rising from his knees and putting on his hat, the defendant, "coming up to object to his presence and actions in conducting the funeral on the cemetery grounds, struck him upon the shoulder, and objecting that he was not permitted to go there as undertaker with a funeral, and that Father Purcell had previously thereto forbidden him to take charge of a funeral at the cemetery, refused to permit him to officiate thereat in the cemetery."

Upon these facts (as in the first case) the defendant requested, and the judge refused, a ruling that the defendant was entitled to an acquittal; whereupon by consent of the defendant a verdict of guilty was returned and the case reported to this court.

MORTON, J. We cannot say, as matter of law, that the verdict of the jury was erroneous. It appeared at the trial, that, after McCarthy had concluded the funeral services, the defendant struck him on the shoulder. It does not appear that this was for the purpose of removing him from the cemetery. If it be admitted that the defendant had the right to remove McCarthy, it does not follow that this assault was justifiable. It was for the jury to decide whether the force used by the defendant was used for the purpose of removing him, and whether it was reasonable in kind and degree. Both of these questions were within the province of the jury to determine, and we cannot revise their finding thereon.

Judgment on the verdict.

5-92 ff 2 ———

HIGGINS v. MINAGHAN.

SUPREME COURT OF WISCONSIN, 1891.

[*Reported* 78 *Wis.* 602.]

COLE, C. J.[1] A number of instructions were asked on the part of the defendant, some of which were covered by the general charge; and

[1] Part of the opinion is omitted. — ED.

some were refused which should have been given. The instructions and charge are too lengthy to be quoted verbatim, nor is it necessary, to make our remarks upon them intelligible. The really controverted question in the case was whether, under the circumstances, the defendant was justified in shooting the plaintiff as he did. The trial court, in considering the question whether the shooting was excusable or justifiable, said:

"The defendant, as he had a lawful right to do, on the 14th day of June married a second wife and took her to his home to live. On the night of June 18, 1887, the plaintiff and others — men and boys — proceeded to the defendant's house, and engaged in what is designated as a *charivari*, the nature and character of which is shown by the evidence. The same thing was repeated on the nights of the 22d and 25th of the same month. It was continued on the last night until the plaintiff was shot, when the crowd dispersed. What was done on each night is for you to ascertain and consider. The plaintiff was present on the 18th and 25th of June, as an actual participant, or aiding and encouraging the others, so that he is responsible for the acts, language, and conduct of each and every one constituting the *charivari* party, the same as if done by himself. He knew what had been done on the night of the 22d, before the commencement of the proceedings and disturbance on the 25th. The defendant, at these times, was in the peaceable pursuit of his own business, at home with his family, and entitled to enjoy domestic peace and tranquillity, without disturbance or molestation from the plaintiff or any one else. These three gatherings by the plaintiff and others were composed of men and boys from the defendant's neighborhood, but whether he knew who they were at these times is, of course, a question for you to determine. The *charivari* parties consisting of the crowd in front of or upon the defendant's premises constituted an unlawful assembly; and by their transactions, conduct, and behavior became what is known in the law as a 'riot,' tending to the disturbance of the peace and the annoyance, if not the terror, of the defendant and others in the vicinity; they were trespassers in the highway. Where an unlawful assembly and riot, like the one in question, offers and threatens violence to persons or property, it may and ought to be repelled with suitable and necessary force; but, where no violence is offered or threatened to person or property, no one is justified in unnecessarily or wantonly killing or wounding a person engaged in a *charivari*. The law provides a punishment for such unlawful acts. Persons thus engaged are not necessarily outlaws beyond the protection of the law, who may be slain or wounded without cause by any person not in any actual or apparent danger from their acts. To enable you to determine whether violence was offered, danger to person or property was threatened or contemplated, the numbers in these unlawful assemblies, and their acts and transactions, proceedings, and conduct on the three nights in question may be considered

on the question of whether the defendant was justified in doing what he did, if he shot the plaintiff in the leg. . . .

"In case you are satisfied from the evidence that the defendant shot the plaintiff in the leg, your next duty will be to determine whether such shooting was excusable or justifiable. Every one has the right to protect himself and his family from danger to life or limb, and his home from invasion by the felonious acts of others. He may employ suitable and appropriate means and methods to prevent or avoid the threatened danger. Before force can be resorted to there must be real or apparent danger, and an apparent necessity of using force to avoid or prevent an injury. One instance is where one person attempts a battery of another, in which case the latter is not obliged to submit until an officer can be found or a suit commenced, but he may oppose violence to violence, and the limit to this privilege is only this: that he must not employ a degree of force not called for in self-defense; he must not inflict serious injuries in repelling slight injuries, nor take life, unless his life or limb is in danger. Where he exceeds the limit of necessary protection and employs excessive force, he becomes a trespasser himself, and his assailant may recover damages from him for repelling the assault with a violence not called for. As mere words never constitute an assault, neither will they justify the employment of force in protection against them, however gross, obscene, or abusive they may be. There are, probably, exceptions to this general statement, in words grossly insulting to females — at least, where one would be excused, where grossly vulgar and insulting language was employed in the presence of his family, if he were promptly to put a stop to it by force. Such force as one may employ in his own defense he may also employ in the defense of his wife, his child, or any member of his family; but to revenge the wrongs of himself or his family is no part of his legal right, and where the danger is repelled, or there is no real or apparent danger, justification for the further use of violence is at an end. The force or means to be employed in self-defense of person or family must be such only as are reasonably necessary to repel or prevent the threatened injury. . . .

"If the noise, disturbance, and disorderly acts of the *charivari* party so affected the wife and children of the defendant that he had reasonable grounds to apprehend that either of them was likely to die or to be seriously injured in body, mind, or health, if such acts were continued, and reasonable cause to believe that such injury might result, then the defendant had the right to use the necessary force to avert the apprehended danger, the same as though an actual attack had been made on their persons; but if the sole and only danger to be apprehended was the injury to his wife and children from fright or terror, then if the defendant with reasonable safety to himself could have approached near enough to have informed the *charivari* party of this fact, he should have done so, and given them an opportunity to desist,

before firing into the crowd; he should have used all reasonable and practicable efforts which he could use without exposing himself to danger to let them know the situation and danger to his family from their acts; but if the acts and conduct of the *charivari* party were of such a character that it would have been impracticable or dangerous to himself or his limb to have gone near enough to have given them this information, then he would be excused from so doing. If alone, and, in addition to danger to his wife and child from fright or terror, there was imminent danger of a felonious attack on his house or on its inmates or himself, no notice to the *charivari* party of such danger to his wife or child would be necessary; but it would be for you to find whether he is excusable or justifiable in firing, at the time and manner he did, under all the circumstances of the case. The shooting or killing of another is justifiable when committed by any person in either of the following cases."

Now, in respect to this charge, we remark (1) that what is said in it about justifiable homicide was calculated to mislead the jury from the real issue. The defendant did not kill any one, and there was no occasion to define justifiable homicide, for no such question was in the case.

(2) We do not think the defendant is bound to notify the *charivari* party that their shooting, noise, and tumult were causing terror and fright to his wife and children, and were seriously injuring them in mind, body, and health. This was the third night these persons had been engaged in these unlawful and criminal proceedings. On the first night they came the defendant had warned them away, and directed them to desist. The rioters themselves knew, or should have known, that their acts and conduct about the house, in the night, were well calculated to produce terror and fright, and injuriously affect the defendant's family. This was the direct, necessary, and almost inevitable consequence of their acts. If the defendant had again requested them to desist and go away, had told them they were causing serious bodily harm to his wife and children, his notice and warning would probably have been received with derision, insulting remarks, and vile abuse, as they had been on previous occasions. So we think it was error to charge that the defendant was bound to inform the *charivari* party of the fact that their riotous conduct was endangering the life of his wife and children, before taking effectual means, by shooting or otherwise, to drive them away. The circuit judge evidently held that the defendant had no right to fire into the body of rioters without notice and without having commanded them to disperse; but upon the undisputed facts of the case the law imposed upon him no such duty.

(3) We think the charge is faulty because it did not point out to the jury the essential difference between an assault by one person and by a body of rioters. An assault in the latter case always inspires more terror and is attended with greater danger than in the former; for, as defendant's counsel says, when a number of men combine to do an un-

lawful act a kind of emulation is excited which leads one after another to go to greater and greater excesses and to resort to more flagrant acts, so that a person assaulted by a mob in that way is necessarily, from the nature of the case, subject to greater terror and apprehension than when the assault is made by an individual, and the assaulted party may act with more promptness and resort to more forcible means to protect himself and suppress the riot than in the latter case. Here the rioters were firing guns, blowing horns, drumming on pans, and making all kinds of hideous noises (76 Wis. 301), and kept up this tumultuous uproar for hours, until his wife and youngest daughter were nearly frightened to death. The defendant could not tell when they would attack his dwelling-house, or shoot him, or personally assault him; and in the excitement and confusion the law would justify or excuse him in the use of firearms for the safety of himself and family, when such means might not be resorted to in the case of an assault by an individual.

This idea, or difference between an assault by one and by a large number, is embraced in the eleventh and twelfth and some of the other instructions asked by the defendant, and the point should have been clearly and emphatically impressed upon the minds of the jury, for the difference is great, and common experience teaches that the danger to life and property is immeasurably greater in one case than in the other. The trial court should have charged in the language of the eleventh request, or in some equivalent language, that "a riot is regarded in law, always, as a dangerous occurrence, because when rioters have convened in a tumultuous and disorderly manner, and have actually begun to accomplish an unlawful act, to the terror or disturbance of others, the prompting of one rioter is contagion to another, and it is impossible to conjecture or ascertain beforehand to what extremities of lawlessness or crime the excitement and confusion may lead. . . . A private person, who cannot otherwise suppress them or defend himself from them, may justify or excuse the use of firearms or other deadly weapons, because it is both a right and a duty to protect one's self and family, and to aid in preserving the peace."

We see no objection to the charge where the jury were directed: "If a person is assaulted in such a way as to induce in him a reasonable belief of danger of losing his life or of suffering great bodily harm, he will be justified in defending himself, although the danger be not real, only apparent. Such a person will not be held responsible civilly or criminally if he acts in self-defense, from real and honest convictions induced by reasonable evidence, although he may be mistaken as to the extent of the actual danger. A person need not be in actual imminent peril of his life or of great bodily harm before he may shoot his assailant; it is sufficient if in good faith he has reasonable ground from the facts, as they appear to him at the time, to apprehend a design to commit a felony, or to do some great personal injury, and reasonable

cause for believing that there is imminent danger of such design being accomplished."

We do not deem it necessary to comment further on the charge. We think the case was not submitted to the jury upon proper instructions, and that there must be a new trial for that reason.

By the Court. — The judgment of the circuit court is reversed, and a new trial ordered.

597242

COPE *v.* SHARPE.

COURT OF APPEAL, 1911.

[*Reported* (1912) 1 *K. B.* 496.]

APPEAL of the defendant from the decision of a Divisional Court (Phillimore, Hamilton, and Scrutton, JJ.) upon an appeal from the county court of Surrey holden at Aldershot, reported [1911] 2 K. B. 837.

The action was for trespass. The plaintiff, who was the owner of land, by an agreement dated February 1, 1909, let the shooting rights over the land to one Chase for a term of two years.

The defendant was bailiff and head gamekeeper to Chase.

During April and May, 1909, a number of heath fires broke out on the land of the plaintiff. On April 21, 1909, a serious fire broke out on the south side of a part of the shooting known as the Welsh Drive, where there was a covert affording shelter to nesting pheasants. There was a conflict of evidence as to the direction of the wind.

Some fifty men were engaged in beating out the fire. While they were thus occupied the defendant came along the Welsh Drive and set fire to strips or patches of heather at some considerable distance from the main fire and between it and the Welsh Drive. On being asked why he interfered he said the men did not know how to deal with a fire. Shortly afterwards the men succeeded in extinguishing the fire.

The plaintiff brought an action in the county court of Hampshire holden at Basingstoke. Judgment was given in that action for the plaintiff for nominal damages and an injunction. The defendant appealed; and the Divisional Court, being in some doubt as to whether the county court judge had directed his mind to the question whether the act of the defendant was necessary for the protection of his master's game, ordered a new trial to be had in the county court of Surrey holden at Aldershot: see the report of Cope *v.* Sharpe, [1910] 1 K. B. 168. It was subsequently ordered that the trial should take place before a jury: see Rex *v.* Surrey County Court Judge, [1910] 2 K. B. 410.

The second trial proved abortive, as the jury could not agree upon a verdict. The case was thereupon heard for the third time. The county court judge left the following questions to the jury:

(1) Was the method adopted by the defendant in fact necessary for the protection of his master's property?

(2) If not, was it reasonably necessary in the circumstances?

The jury answered the first question in the negative, and the second in the affirmative. An argument ensued as to which question was as a matter of law the proper question to be left. The county court judge held that the second was the proper question. He therefore entered judgment for the defendant.

The plaintiff appealed to a Divisional Court, who entered judgment for the plaintiff, [1911] 2 K. B. 837.

The defendant appealed.

KENNEDY, L. J. I have come to the conclusion that this appeal ought to be allowed and the judgment of the learned judge of the county court restored.

With parts of the judgments pronounced in the Divisional Court I agree. I agree in holding that an interference with the property or the person of another, which otherwise would certainly constitute an actionable trespass, cannot be justified by mere proof on the part of the alleged trespasser of his good intention and of his belief in the existence of a danger which he sought by his act of interference to avert, but which in fact did not exist at all. The case cited by Phillimore, J., from the Year Book, Hil. 22 Edw. 4, f. 45, pl. 9, 10, as to the imprisonment of a supposed lunatic, supports and illustrates this view. The person imprisoned was not in fact a lunatic; therefore there was not any basis of danger to justify his imprisonment. There are, however, two points upon which I respectfully differ from the Divisional Court in the present case. The first of these is that the learned judges in that Court have decided against the defendant upon the ground that, according to the first of the two findings of the jury, he has failed to prove that his interference with the plaintiff's property — the patches of heather which the defendant burned — was actually necessary in order to save the covert in which were the nesting pheasants from being involved in the conflagration. They have held that the second finding of the jury that the course which the defendant pursued in order to save the nesting pheasants was "reasonably necessary" afforded no defense. The principle of such a decision, as it appears to me, can only be that, although at the moment of the interference of an alleged trespasser with the property of another the danger to life or property which it was sought to avert by that interference was a real and existent danger, and a danger so imminent that any reasonable man would in the circumstances treat it as one in which it was necessary, in order to save life or property endangered, to interfere as the alleged trespasser has done, he must be held, nevertheless, guilty of a trespass,

unless he can also prove that, but for that interference, the person or the property which he sought to protect *must* — for nothing less than this is the meaning of the expression "actually necessary" — have suffered harm or loss.

I do not think that this is the law. The justification of such interference depends, in my judgment, upon the state of things at the moment at which the interference takes place, and not upon the inference as to necessity to be drawn from the event. A house is on fire; the fire, as the wind is blowing, creates an imminent danger for the occupant of the adjoining premises, and he, to avert that danger, pours water into the burning house. Let us suppose that the wind suddenly changes, or that unforeseen assistance arrives, so that in the event it is plain that the discharge of water into the burning house was not actually necessary for the preservation of the adjoining premises; can it rightly be contended that if, upon the trial of an action brought by the owner of the burning house to recover compensation for property which was damaged by the water, it was proved to the satisfaction of the jury that the commission of the act complained of was, at the time when such damage was done, "reasonably necessary" (in the words of the second finding of the jury in the present case) in order to save life or property in the premises then endangered by their proximity to the conflagration, the plaintiff would nevertheless succeed, because it was proved by him at the trial that, by reason of the subsequent change of wind or by reason of the arrival of unforeseen assistance, his neighbor's precaution was, in the event, *actually* unnecessary?

Or, take the case of the jettison of cargo at sea. Could it properly be contended that the legal justification of the jettison depends upon proof that in fact, as things have happened, it was *actually* necessary for the safety of the adventure, and that a jettison made reasonably in order to preserve the adventure from imminent peril of destruction in a gale must be held to be unjustifiable, if the owner of the goods jettisoned can prove that, after the jettison took place, a sudden fall of the wind or a sudden change in its direction removed the peril and that, therefore, the adventure would in fact have been preserved without the jettison? In my humble judgment, this question ought to be answered in the negative; and, if authority is sought upon the point, I think it sufficiently appears in the judgment of Brett, L. J., in Whitecross Wire Co. *v.* Savill, 8 Q. B. D. 653, and in the statement in 2 Phillips on Insurance, 3d ed., ch. 15, s. 1, par. 1270 (cited in the argument of the last mentioned case), that, "in order to constitute a basis for a contribution for an expense or sacrifice" — or, in other words, in order to justify the destruction or damage of property at sea for the safety of the adventure — "it must be occasioned by an *apparently imminent peril.*" I do not think that either Mouse's Case, 12 Rep. 63, or Maleverer *v.* Spinke, Dyer, 35 b., or Dewey *v.* White, Moo. & M. 56, cited by Phillimore, J., furnish any authority for an opposite view.

On the contrary, it appears to me that the judgment of Best, C. J., in Dewey *v.* White, Moo. & M. 56, in comparing the justification of the damage caused by pulling down a dangerous structure with the justification in the case of maritime jettison, tends to support the contention of the appellant. These cases do show that the law requires, in order to make good a defense in an action of trespass for interference with the property of another for the purpose of averting an imminent danger, that the defendant shall prove that such a danger existed actually, and not merely in the belief of the defendant. They do not show that, even if the existence of such an imminent danger as to vindicate the reasonableness of the interference in order to preserve property exposed to the danger is proved, the defense must still fail unless it is also proved that the interference was, in the circumstances as they eventually happened, actually necessary, that is to say, that the property sought to be preserved must, but for the interference complained of, have suffered injury or destruction. Nor is there anything in my own judgment in Carter *v.* Thomas, [1893] 1 Q. B. 673, to which I refer only because it is mentioned by Phillimore, J., that conflicts with the views which I have just expressed. What I was there at pains to point out was that in the case of a mere volunteer it would require very special circumstances to justify, on the ground of reasonable necessity, his forcible entry into the premises of another against the will of the owner, in order to help in extinguishing a fire. In the present case, the defendant was not a mere volunteer, and therefore no such question arises for consideration. He was the gamekeeper in the service of Mr. Chase, to whom the plaintiff, the landowner, had let the sporting rights over his estate, including the land on which the fire occurred and on which were the heather patches fired by the defendant and the covert sheltering the nesting birds which the defendant sought to protect from the fire by destroying some patches of the heather in advance of the flames. The defendant's fulfillment of a duty to his master, as Hamilton, J., points out, could not affect any right of the plaintiff, but, at the same time, in acting for his master, the defendant was, as against the plaintiff, entitled to stand in the same position as his master as lessee of the sporting rights who had, as tenant, the right to maintain the game by all means which did not involve unreasonable interference with, or damage to, the property of the lessor. Reasonableness — the term which our law in so many cases treats as the test of legality in questions of human conduct — of course includes, when you are considering the legality of the destruction of another's property, the comparison (*inter alia*) of the value of that which is destroyed or damaged in order to preserve it. Here, as the judgment pronounced by Phillimore, J., shows, the damage resulting from the defendant's act was not more than nominal. It appears to me that, in considering the reasonableness of the defendant's conduct in the present case, the jury were warranted in including in the circumstances to which they expressly

refer in their second finding the fact that the defendant was not a mere volunteer but, as representing his employer, the plaintiff's tenant, invested, as against the plaintiff as well as others, with the right to preserve the sitting pheasants from being burned by reasonable methods.

I have so far been dealing with the view of the Divisional Court that a defense of "actual necessity" must be proved in order to establish an answer to the plaintiff's case in this action. But I am further obliged to differ from them in the construction which they appear to have placed upon the second finding of the jury. By that finding the jury in express terms decided that "the method adopted by the defendant for the protection of his master's property was reasonably necessary in the circumstances." The learned judges in the Divisional Court, if I correctly understand their judgments, have construed this finding to mean only that the defendant reasonably believed that a danger to his master's property existed requiring his interference, but that in fact no such danger existed. I must confess myself unable so to interpret it. I do not think this is the fair or natural meaning of the words. The jury, in my view, have not found that the method adopted by the defendant was unnecessary. They have found that it was in fact not necessary; they have found that it was necessary in reason. They have not in either of their findings negatived the existence of an imminent danger. Read, as it ought to be, in contrast with the first finding that no "actual necessity" existed, the second finding, that a "reasonable necessity" for the defendant's action did exist, *must*, I think, mean that there was, at the time when the defendant acted, a danger to the property of the defendant's master, so far imminent that any reasonable person in the circumstances of the defendant would act reasonably in treating it as necessary to adopt the method for the preservation of the property in jeopardy which the defendant adopted. So interpreted, this finding in my opinion gives the defendant, as it was held by the learned county court judge who tried the case, a good defense, and this opinion appears to me to be in accord with the statement of the law by Bramwell, B., in Kirk *v.* Gregory, 1 Ex. D. 55, from which the other members of the court (Amphlett, B., and Cleasby, B.) in no way dissented. I think that this appeal should be allowed.[1]

Appeal allowed.

[1] The concurring opinion of BUCKLEY, L. J., and the dissenting opinion of Vaughan WILLIAMS, L. J., are omitted. — ED.

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COMMONWEALTH v. DONAHUE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1889.

[*Reported* 148 *Massachusetts*, 529.]

HOLMES, J. This is an indictment for robbery, on which the defendant has been found guilty of an assault. The evidence for the Commonwealth was, that the defendant had bought clothes, amounting to twenty-one dollars and fifty-five cents, of one Mitchelman, who called at the defendant's house, by appointment, for his pay; that some discussion arose about the bill, and that the defendant went upstairs, brought down the clothes, placed them on a chair, and put twenty dollars on a table, and told Mitchelman that he could have the money or the clothes; that Mitchelman took the money and put it in his pocket, and told the defendant he owed him one dollar and fifty-five cents, whereupon the defendant demanded his money back, and on Mitchelman refusing, attacked him, threw him on the floor, and choked him until Mitchelman gave him a pocketbook containing twenty-nine dollars. The defendant's counsel denied the receiving of the pocketbook, and said that he could show that the assault was justifiable, under the circumstances of the case, as the defendant believed that he had a right to recover his own money by force if necessary. The presiding justice stated that he should be obliged to rule that the defendant would not be justified in assaulting Mitchelman to get his own money, and that he should rule as follows: "If the jury are satisfied that the defendant choked and otherwise assaulted Mitchelman, they would be warranted in finding the defendant guilty, although the sole motive of the defendant was by this violence to get from Mitchelman by force money which the defendant honestly believed to be his own." Upon this the defendant saved his exceptions, and declined to introduce evidence; the jury were instructed as stated, and found the defendant guilty.

On the evidence for the Commonwealth, it appeared, or at the lowest the jury might have found, that the defendant offered the twenty dollars to Mitchelman only on condition that Mitchelman should accept that sum as full payment of his disputed bill, and that Mitchelman took the money, and at the same moment, or just afterwards, as part of the same transaction, repudiated the condition. If this was the case, — since Mitchelman, of course, whatever the sum due him, had no right to that particular money except on the conditions on which it was offered (Commonwealth *v.* Stebbins, 8 Gray, 492), — he took the money wrongfully from the possession of the defendant, or the jury might have found that he did, whether the true view be that the defendant did not give up possession, or that it was obtained from him by Mitchelman's fraud. Commonwealth *v.* Devlin, 141 Mass. 423, 431; Chisser's

Case, T. Raym. 275, 276; Regina v. Thompson, Leigh & Cave, 225; Regina v. Stanley, 12 Cox C. C. 269; Regina v. Rodway, 9 C. & P. 784; Rex v. Williams, 6 C. & P. 390; 2 East P. C. c. 16, ss. 110, 113. See Regina v. Cohen, 2 Den. C. C. 249, and cases *infra*. The defendant made a demand, if that was necessary, which we do not imply, before using force. Green v. Goddard, 2 Salk. 641; Polkinhorn v. Wright, 8 Q. B. (N. S.) 197; Commonwealth v. Clark, 2 Met. 23, 25, and cases *infra*.

It is settled by ancient and modern authority that, under such circumstances, a man may defend or regain his momentarily interrupted possession by the use of reasonable force, short of wounding or the employment of a dangerous weapon. Commonwealth v. Lynn, 123 Mass. 218; Commonwealth v. Kennard, 8 Pick. 133; Anderson v. State, 6 Baxter, 608; State v. Elliot, 11 N. H. 540, 545; Rex v. Milton, Mood. & Malk. 107; Y. B. 9 Edw. IV. 28, pl. 42; 19 Hen. VI. 31, pl. 59; 21 Hen. VI. 27, pl. 9. See Seaman v. Cuppledick, Owen, 150; Taylor v. Markham, Cro. Jac. 224; s. c. Yelv. 157, and 1 Brownl. 215; Shingleton v. Smith, Lutw. 1481, 1483; 2 Inst. 316; Finch, Law, 203; 2 Hawk. P. C. c. 60, s. 23; 3 Bl. Com. 121. To this extent the right to protect one's possession has been regarded as an extension of the right to protect one's person, with which it is generally mentioned. Baldwin v. Hayden, 6 Conn. 453; Y. B. 19 Hen. VI. 31, pl. 59; Rogers v. Spence, 13 M. & W. 571, 581; 2 Hawk. P. C. c. 60, s. 23; 3 Bl. Com. 120, 131.

We need not consider whether this explanation is quite adequate. There are weighty decisions which go further than those above cited, and which hardly can stand on the right of self-defence, but involve other considerations of policy. It has been held that, even where a considerable time had elapsed between the wrongful taking of the defendant's property and the assault, the defendant had a right to regain possession by reasonable force, after demand upon the third person in possession, in like manner as he might have protected it without civil liability. Whatever the true rule may be, probably there is no difference in this respect between the civil and the criminal law. Blades v. Higgs, 10 C. B. (N. S.) 713; 12 C. B. (N. S.) 501; 13 C. B. (N. S.) 844; and 11 H. L. Cas. 621; Commonwealth v. McCue, 16 Gray, 226, 227. The principle has been extended to a case where the defendant had yielded possession to the person assaulted, through the fraud of the latter. Hodgeden v. Hubbard, 18 Vt. 504. See Johnson v. Perry, 56 Vt. 706. On the other hand, a distinction has been taken between the right to maintain possession and the right to regain it from another who is peaceably established in it, although the possession of the latter is wrongful. Bobb v. Bosworth, Litt. Sel. Cas. 81. See Barnes v. Martin, 15 Wis. 240; Andre v. Johnson, 6 Blackf. 375; Davis v. Whitridge, 2 Strobh. 232; 3 Bl. Com. 4. It is unnecessary to decide whether, in this case, if Mitchelman had taken the money with a fraudulent intent, but had not repudiated the condition until

afterwards, the defendant would have had any other remedy than to hold him to his bargain if he could, even if he knew that Mitchelman still had the identical money upon his person.

If the force used by the defendant was excessive, the jury would have been warranted in finding him guilty. Whether it was excessive or not was a question for them; the judge could not rule that it was not, as matter of law. Commonwealth *v.* Clark, 2 Met. 23. Therefore the instruction given to them, taken only literally, was correct. But the preliminary statement went further, and was erroneous; and coupling that statement with the defendant's offer of proof, and his course after the rulings, we think it fair to assume that the instruction was not understood to be limited, or, indeed, to be directed to the case of excessive force, which, so far as appears, had not been mentioned, but that it was intended and understood to mean that any assault to regain his own money would warrant finding the defendant guilty. Therefore the exceptions must be sustained.

It will be seen that our decision is irrespective of the defendant's belief as to what he had a right to do. If the charge of robbery had been persisted in, and the difficulties which we have stated could have been got over, we might have had to consider cases like Regina *v.* Boden, 1 C. & K. 395, 397; Regina *v.* Hemmings, 4 F. & F. 50; State *v.* Hollyway, 41 Iowa, 200. Compare Commonwealth *v.* Stebbins, 8 Gray, 492; Commonwealth *v.* McDuffy, 126 Mass. 467. There is no question here of the effect of a reasonable but mistaken belief with regard to the facts. State *v.* Nash, 88 N. C. 618. The facts were as the defendant believed them to be. *Exceptions sustained.*

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HODGEDEN *v.* HUBBARD.

SUPREME COURT OF VERMONT, 1843.

[*Reported* 18 *Vt.* 504.]

TRESPASS for assault and battery, and for taking and carrying away a stove, the property of the plaintiff. Plea the general issue, with notice of special matter of defense, and trial by jury, — *Redfield*, J., presiding. On trial the plaintiff gave evidence, tending to prove, that, on the nineteenth day of September, 1842, he purchased at the Tyson warehouse, in Montpelier, a stove, and gave his promissory note therefor, payable in six months; that the agent, who had charge of the warehouse, was absent at the time, and the sale was made by the defendant Hubbard, who was clerk for the agent, as was also the defendant Ayres; that on the same day, and soon after the sale, the defendants learned, that the plaintiff was irresponsible as to property, and started

in pursuit of him, and overtook him about two miles from Montpelier and took the stove from him by force; but it did not appear, how much force was used, or its character; but it did appear, that, in the attempt to dispossess the plaintiff of the stove, he drew his knife, and that he was then forcibly held by one of the defendants, while the other took possession of the stove; and the testimony tended to prove, that the resistance of the plaintiff was such, that the defendants used violence and applied force to his person with great rudeness and outrage. The defendants then gave evidence, tending to prove that the purchase of the stove by the plaintiff was effected by means of his false and fraudulent representations as to his ability to pay, and as to the amount of his property; that, among other things, the plaintiff represented, that he owned a farm in Cabot and considerable stock upon it, that he owned the team that he then had with him, and that he carried on a large business manufacturing butter firkins, etc.; that it was only by means of these representations, and others of like character, that Hubbard was induced to sell the stove to the plaintiff on credit; that soon after the delivery of the stove, on the same day, Hubbard learned, upon inquiry, from a person whom he saw from Cabot, that the plaintiff was entirely irresponsible, and that his representations as to his property were wholly false; and that the defendants immediately followed the plaintiff, and took the stove from him, and told him that he could have the note by calling for it.

The defendants requested the court to instruct the jury, that, if they should find that the purchase of the stove on credit was effected only by means of the false and fraudulent representations of the plaintiff, as above specified, the title to the stove did not vest in the plaintiff, and the defendants, as servants of the agent of the Tyson warehouse, were justified in pursuing the plaintiff and taking the stove from him by force, and that, if they used no more force than was absolutely necessary to effect this object, the plaintiff could not recover upon his count for an assault and battery. But the court charged the jury that, although the plaintiff was guilty of misrepresentation and fraud, in obtaining the stove, in the manner attempted to be proved by the defendants, yet this would not justify the defendants in forcibly taking the property from him; that the property in the stove would not be changed by the purchase, and the defendants might take it peaceably, wherever they could find it; but that the defendants, having delivered the stove to the plaintiff, could not justify taking it from him by blows inflicted upon his person, or by holding him, but should resort to redress by legal process; and that, if they should find, that the property in the stove was not changed, for the reason stated, and that the defendants took it by violence, in the manner attempted to be shown by the plaintiff, although they used no more force than was necessary to accomplish that object under the resistance of the plaintiff, they would still be liable in this action; but the court, in that case, recom-

mended to the jury to give small damages. Verdict for plaintiff for one dollar damages.

WILLIAMS, C. J. It is admitted, in this case, that the property in the stove did not pass to the plaintiff, that, though the plaintiff obtained possession of the stove, yet it was by such means of falsehood and fraud, criminal in the eye of the law, as made the possession unlawful, and that, although the consent of the owner was apparently obtained to the delivery of the possession to the plaintiff, yet, as it respects the plaintiff, and so far as the right of property was concerned, no such consent was given. In the cases of Buffington *v.* Gerrish, 15 Mass. 156, and Badger *v.* Phinney, Ib. 359, it was decided that, under similar circumstances, as between the owner and the person thus obtaining property, or between the owner and the existing creditors of such person, no property passed out of the real owner, and he might reclaim it, as against such person, or his creditors.

In the present case the defendants had clearly a right to retake the property, thus fraudulently obtained from them, if it could be done without unnecessary violence to the person, or without breach of the peace. It is admitted by the counsel for the plaintiff, that a right to re-capture existed in the defendants, if it could be done without violence, or breach of the peace. And how far this qualification of the right to retake property, thus taken, was intended for the security, or benefit, of the fraudulent possessor may admit of some doubt. Whoever is guilty of a breach of the peace, or of doing unnecessary violence to the person of another, although it may be in the assertion of an unquestioned and undoubted right, is liable to be prosecuted therefor. But the fraudulent possessor is not the protector of the public interest.

In the case before us it is stated, that it did not appear "how much force was used, or its character," before the defendants were assaulted by the plaintiff. To obtain possession of the property in question no violence to the person of the plaintiff was necessary, or required, unless from his resistance. It was not like property carried about the person, as a watch, or money; nor did it require a number of people to effect the object. The plaintiff had no lawful possession, nor any right to resist the attempts of the defendants to regain the property, of which he had unlawfully and fraudulently obtained the possession. By drawing his knife he became the aggressor, inasmuch as he had no right thus to protect his fraudulent attempt to acquire the stove, and the possession of the same, and it was the right of the defendants to hold him by force, and, if they made use of no unnecessary violence, they were justified; if they were guilty of more, they were liable.

Under the view of the evidence, as considered and claimed by the defendants, they were entitled to the charge requested. The refusal of the court so to charge was erroneous; and although the court stated to the jury correctly, that the defendants could not justify retaking the property by blows inflicted on the person of the plaintiff, yet this

was not meeting the request; and the charge was evidently erroneous, when the jury were told, that the defendants would be liable, although they used no more force than was necessary to accomplish the object of retaking the property, under the resistance of the plaintiff. The resistance of the plaintiff was unlawful, in regard to the particular species of property, which was then the subject of controversy, under the facts claimed by the defendants, and which must have been found to the satisfaction of the jury, as would seem from their verdict.

On the second count in the declaration the plaintiff could have no claim whatever. The defendants were the agents of the true owner; the plaintiff was the wrongdoer, and acquired no right, against the defendants, to either property, or possession, if the facts were as stated in the case.

The judgment of the county court is reversed.

McLEOD v. JONES.

SUPREME JUDICIAL COURT OF MASSACHUSETTS 1870.

[*Reported* 105 *Mass.* 403.]

TORT for forcibly entering the plaintiff's close in Taunton, and removing and converting to the defendant's use household furniture found therein.

At the trial in the Superior Court, before *Pitman*, J., property in and possession of the close (which was the upper story of a house) by the plaintiff were admitted; and the plaintiff introduced evidence to show that he had hired and occupied the premises as a residence and dwelling for himself and his wife and two children, about two years, when in September, 1868, he took them on a visit to Fall River, and he himself went to New York on a visit to his father; that he intended to return to Taunton in about four weeks, but for various reasons changed his original design and ceased to reside in Taunton; that three or four days after he went away, "leaving his furniture and household goods in the same state as he used them for housekeeping purposes, and the doors of his tenement locked," the defendant went to the house with a key that would fit the door, unlocked and entered the tenement, and took and carried away the furniture.

It appeared "that the plaintiff, while living in Providence, had given to the defendant a bill of sale of a part or the whole of the articles of furniture, and had subsequently brought them with him to Taunton; and that the plaintiff had formerly given to the defendant a mortgage of certain goods owned and used by the plaintiff in his shop, some of which goods the plaintiff testified that he subsequently carried to his house, and were among the goods taken by the defendant."

The defendant claimed all the articles taken by him, under the bill of sale and mortgage, and contended that, from the circumstances proved, he had a right to believe that at the time of the entry the plaintiff did not intend to return to Taunton; and he asked the judge to rule that "if the plaintiff had left the city with his family, leaving household furniture, the defendant's property, in his last place of residence in the city, a hired tenement, and the defendant, having reasonable cause to believe, and believing, that the plaintiff and family did not intend to return, entered said residence in a quiet and peaceable manner and took away his goods, causing no other disturbance than was necessary in order to get the same, he would not be liable in this action." The judge refused so to rule; and ruled that "if the defendant entered the plaintiff's dwelling-house in the manner shown by the plaintiff's evidence above reported, and carried away the goods as shown by the plaintiff's evidence, he would be liable in this action for a forcible entry, although he went there to get his own property; and that the defendant would have no right to enter the same in such a manner, and for such a purpose, without some license or permission from the plaintiff, express or implied, other than the mere fact that his goods were in said premises under the circumstances before stated." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

WELLS, J. The defendant was liable as a trespasser for entering the plaintiff's close, unless he can justify his entry by some legal right, or by some license or permission so to do. The plaintiff's absence will not excuse him. Reasonable cause to believe, and actual belief that the plaintiff and his family did not intend to return, are no defense. The only question is, whether the ruling of the court below was correct, that "the mere fact that his goods were in said premises under the circumstances stated" did not furnish a sufficient ground from which a license, permission or legal right could be inferred.

In the decision of this question, we must assume that the defendant's claim would have been sustained, that his title, as mortgagee of all the property taken away by him, was valid, and his mortgage debt unpaid. He had a right then to the possession of the property which he took.

But the possession of the plaintiff, as mortgagor, was not wrongful. The goods were rightfully upon his premises. There is nothing to show that the terms of the mortgage, or bill of sale, under which the defendant claimed them, gave him any special authority to enter for the purpose of recovering the property, in any event; nor that the removal of the goods from the shop to the house, or from Providence to Taunton, was inconsistent with the rights of the mortgagee, or against his wishes. The removal from Providence was about two years before the time of this entry.

The goods then were rightfully in the custody of the plaintiff, and

within his close. The defendant was the owner of the legal title, with a present right of possession. Does that alone justify him in a breach of the plaintiff's close? A majority of the court are of opinion that it does not.

One whose goods are stolen, or otherwise illegally taken from him, may pursue and retake them whenever they may be found. No one can deprive him of this right, by wrongfully placing them upon his own close. Patrick *v.* Colerick, 3 M. & W. 483. Webb *v.* Beavan, 6 M. & G. 1055, and note. Com. Dig. Trespass D, citing 2 Rol. Ab. 565, l. 54. Bac. Ab. Trespass F, 1. But if they are deposited upon the land of another, who is not a participant in the wrongful taking, the owner cannot enter upon his land to retake them; unless in case of theft, and fresh pursuit. 20 Vin. Ab. 506, Trespass H, a. 2, pl. 4, 5. So, from the necessity of the case, one whose cattle escape upon the land of another may follow and drive them back, without being a trespasser, unless the escape itself was a trespass. Com. Dig. Trespass D, citing 2 Rol. Ab. 565, l. 35.

In these cases, the law gives the party a right to enter for that particular purpose.

In other cases a right or license to enter upon land results, or may be inferred, from the contracts of the parties in relation to personalty. Permission to keep, or the right to have one's personal property upon the land of another, involves the right to enter for its removal. Doty *v.* Gorham, 5 Pick. 487. Bac. Ab. Trespass F, 1. White *v.* Elwell, 48 Maine, 360.

A sale of chattels, which are at the time upon the land of the seller, will authorize an entry upon the land to remove them, if, by the express or implied terms of the sale, that is the place where the purchaser is to take them. Wood *v.* Manley, 11 Ad. & El. 34. Nettleton *v.* Sikes, 8 Met. 34. Giles *v.* Simonds, 15 Gray, 441. Drake *v.* Wells, 11 Allen, 141. McNeal *v.* Emerson, 15 Gray, 384.

A license is implied, because it is necessary in order to carry the sale into complete effect; and is therefore presumed to have been in contemplation of the parties. It forms a part of the contract of sale. The seller cannot deprive the purchaser of his property, or drive him to an action for its recovery, by withdrawing his implied permission to come and take it. This proposition does not apply, of course, to a case where a severance from the realty is necessary to convert the subject of the sale into personalty, and the revocation is made before such severance.

But there is no such inference to be drawn, when the property, at the time of sale, is not upon the seller's premises; or when, by the terms of the contract, it is to be delivered elsewhere. And when there is nothing executory or incomplete between the parties in respect to the property, and there is no relation of contract between them affecting it, except what results from the facts of ownership or legal title in one, and pos-

session in the other, no inference of a license to enter upon lands for the recovery of the property can be drawn from that relation alone. 20 Vin. Ab. 508, Trespass H, a. 2, pl. 18. Anthony *v.* Haneys, 8 Bing. 186. Williams *v.* Morris, 8 M. & W. 488.

We think the authorities cited illustrate and establish these distinctions.

It is said in Com. Dig. Trespass D, citing 2 Rol. Ab. 566, l. 30, that I may not enter lands "for retaking goods, which he, who holds them in common with me, put there; for though a tenant in common may retake goods in common, when the other takes them, yet he cannot justify a trespass to do it."

In Wood *v.* Manley, 11 Ad. & El. 34, where the doctrine that a sale of goods, to be taken on the premises of the seller, gives a license to the purchaser to enter and take them, is laid down, it is guarded by the remark of Patteson, J., "I do not say that a mere purchase will give a license."

In Bac. Ab. Trespass F, 1, it is said: "But if J. S. have commanded A. to deliver a beast to J. N. and J. N. go into the close of J. S. to receive the beast, the action does lie; for, as the beast might have been delivered at the gate of the close, the going of J. N. thereinto is not necessary."

In the note to Webb *v.* Beavan, 6 M. & G. 1055, is a citation from the year books, 9 Edw. IV. 35, in which Littleton, J., after laying down the doctrine that a man may enter the close of another to retake his own goods wrongfully put there, is reported to have said: "But it is otherwise if I bail goods to a man. I cannot enter his house and take the goods, for they did not come there by wrong, but by the act of us both."

It is by the act of both, that goods, upon which the defendant had only a chattel mortgage, leaving the possession rightfully with the plaintiff, were in the plaintiff's house. In 20 Vin. Ab. 507, Trespass H, a. 2, pl. 12, it is said: "If a man takes my goods and puts them upon his land, I may enter and retake them. Contrary upon bailment of goods," citing the above authority of Littleton. A note contains the following: "When a man bails goods to another to keep, it is not lawful for him, though the doors are open, to enter into the house of the bailee and to take the goods, but ought to demand them; and if they are denied, to bring writ of detinue, and to obtain them by law," citing Bro. Ab. Trespass, pl. 208, and 21 Hen. VII. 13. A right to enter the premises of the mortgagor, without legal process, is not essential to the security of the mortgagee of personal property. Permission to do so is not implied, therefore, from the existence of that relation alone. If there was anything in the form of the mortgage or bill of sale, or in the nature and circumstances of the plaintiff's possession of the property, which gave the defendant a right to seek it within the close of the plaintiff, where it had been deposited since the sale of the mortgage or

bill of sale, it should have been made to appear. The burden was upon the defendant to establish the special right which he set up in justification of his entry. At the trial, he based his right to enter, solely upon his title to the personal property, and the supposed abandonment of the premises by the plaintiff; and asked the court to rule that that was sufficient. The court held it to be insufficient "without some license or permission from the plaintiff, express or implied." The defendant does not show that there was anything in the terms of his bill of sale or mortgage, or in the situation of the property at the time it was made, or in the circumstances of the plaintiff's possession at the time of the entry, from which such license or permission could be implied; and he asked no instructions upon the evidence, upon that point, if any existed at the trial.

In McNeal *v.* Emerson, 15 Gray, 384, the property mortgaged was furniture, which remained in the same situation as when the mortgage was made, and the circumstances left the case in the same position substantially as a sale of personal property to be removed by the purchaser.

In the case of Heath *v.* Randall, 4 Cush. 195, the jury must have found, under the instructions given them, that the contract was that the defendant had a right to take the property away any day until paid for; which was plainly understood to mean a right to take it from the premises of the bailee. It is to be observed also, that in that case the question pressed in the argument, and to which the discussion by the court was mainly directed, was that of the right to terminate the bailment without demand of the balance due upon the conditional purchase; the right of entry upon the plaintiff's close being considered only incidentally.

A majority of the court are of opinion that the facts reported in this case are not sufficient to sustain the justification relied on by the defendant, and that the instructions upon that point were correct. If the defendant established his title to the property taken away, he would of course be liable only for such injury as he did to the plaintiff's house. But no question appears to be raised as to the measure of damages, and we are to presume that proper instructions upon that point were given.

Exceptions overruled.

SALISBURY *v.* GREEN.

SUPREME COURT OF RHODE ISLAND, 1892.

[*Reported* 17 *R. I.* 758.]

PER CURIAM. At the trial of this case in the Court of Common Pleas, the plaintiff requested the court to charge the jury "that, if the defendant entered upon the premises of the plaintiff without the permis-

sion of the plaintiff, then the plaintiff is entitled to a verdict." The court refused this request and charged the jury "that the defendant had a right to enter upon the plaintiff's premises to get possession of and recover his property, using no more force than was necessary, and committing no breach of the peace." We think this was error. The horse in question was, and for some time previous had been, in the peaceable possession of the plaintiff, under a claim of right, and hence the defendant, although claiming that the horse was his, was not warranted in entering upon the plaintiff's premises without his permission, and taking forcible possession thereof, against the will of the plaintiff. For, even if the defendant was in fact the legal owner of the horse, coupled with a present right of possession, that alone did not justify him in a breach of the plaintiff's close. If the horse had been stolen or otherwise illegally taken from the defendant, it is stating it within the established rule to hold that he would have a right to pursue and retake it wherever it might be found, provided he could do so without a breach of the peace. See Cooley on Torts, 50, Tit. RECAPTION OR REPRISAL. In this case, however, it appears that the defendant, some time previous to the occurrence in question, had delivered possession of said horse to one Whitfield Dyer, under an agreement to sell it to him, and that said Dyer's father had exchanged said horse for another with a third person, from whom the plaintiff bought it. The wrongful taking of the property from the possession of the owner, therefore, together with the fresh pursuit which must appear in order to warrant the recaption thereof by force, was not shown in this case. See Kirby *v.* Foster, 17 R. I. 437; McLeod *v.* Jones, 105 Mass. 403. As there must be a new trial of the case, for the reason above given, it becomes unnecessary for us to decide whether or not the verdict was against the evidence.

Petition for new trial granted.

612742

VINCENT *v.* LAKE ERIE TRANSPORTATION CO.

SUPREME COURT OF MINNESOTA, 1910.

[*Reported* 109 *Minn.* 456.]

O'BRIEN, J. The steamship Reynolds, owned by the defendant, was for the purpose of discharging her cargo on November 27, 1905, moored to plaintiffs' dock in Duluth. While the unloading of the boat was taking place a storm from the northeast developed, which at about ten o'clock P. M., when the unloading was completed, had so grown in violence that the wind was then moving at fifty miles per hour and continued to increase during the night. There is some evidence that one, and perhaps two, boats were able to enter the harbor that night, but it is plain that navigation was practically suspended from the

hour mentioned until the morning of the twenty-ninth, when the storm abated, and during that time no master would have been justified in attempting to navigate his vessel, if he could avoid doing so. After the discharge of the cargo the Reynolds signaled for a tug to tow her from the dock, but none could be obtained because of the severity of the storm. If the lines holding the ship to the dock had been cast off, she would doubtless have drifted away; but, instead, the lines were kept fast, and as soon as one parted or chafed it was replaced, sometimes with a larger one. The vessel lay upon the outside of the dock, her bow to the east, the wind and waves striking her starboard quarter with such force that she was constantly being lifted and thrown against the dock, resulting in its damage, as found by the jury, to the amount of $500.

We are satisfied that the character of the storm was such that it would have been highly imprudent for the master of the Reynolds to have attempted to leave the dock or to have permitted his vessel to drift away from it. One witness testified upon the trial that the vessel could have been warped into a slip, and that, if the attempt to bring the ship into the slip had failed, the worst that could have happened would be that the vessel would have been blown ashore upon a soft and muddy bank. The witness was not present in Duluth at the time of the storm, and, while he may have been right in his conclusions, those in charge of the dock and the vessel at the time of the storm were not required to use the highest human intelligence, nor were they required to resort to every possible experiment which could be suggested for the preservation of their property. Nothing more was demanded of them than ordinary prudence and care, and the record in this case fully sustains the contention of the appellant that, in holding the vessel fast to the dock, those in charge of her exercised good judgment and prudent seamanship.

It is claimed by the respondent that it was negligence to moor the boat at an exposed part of the wharf, and to continue in that position after it became apparent that the storm was to be more than usually severe. We do not agree with this position. The part of the wharf where the vessel was moored appears to have been commonly used for that purpose. It was situated within the harbor at Duluth, and must, we think, be considered a proper and safe place, and would undoubtedly have been such during what would be considered a very severe storm. The storm which made it unsafe was one which surpassed in violence any which might have reasonably been anticipated.

The appellant contends by ample assignments of error that, because its conduct during the storm was rendered necessary by prudence and good seamanship under conditions over which it had no control, it cannot be held liable for any injury resulting to the property of others, and claims that the jury should have been so instructed. An analysis of the charge given by the trial court is not necessary, as in our opinion

the only question for the jury was the amount of damages which the plaintiffs were entitled to recover, and no complaint is made upon that score.

The situation was one in which the ordinary rules regulating property rights were suspended by forces beyond human control, and if, without the direct intervention of some act by the one sought to be held liable, the property of another was injured, such injury must be attributed to the act of God, and not to the wrongful act of the person sought to be charged. If during the storm the Reynolds had entered the harbor, and while there had become disabled and been thrown against the plaintiffs' dock, the plaintiffs could not have recovered. Again, if while attempting to hold fast to the dock the lines had parted, without any negligence, and the vessel carried against some other boat or dock in the harbor, there would be no liability upon her owner. But here those in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted.

In Dupee *v.* Flatau, 100 Minn. 299, 111 N. W. 1, 8 L. R. A (N. S.) 485, this court held that where the plaintiff, while lawfully in the defendants' house, became so ill that he was incapable of traveling with safety, the defendants were responsible to him in damages for compelling him to leave the premises. If, however, the owner of the premises had furnished the traveler with proper accommodations and medical attendance, would he have been able to defeat an action brought against him for their reasonable worth?

In Ploof *v.* Putnam (Vt.) 71 Atl. 188, 20 L. R. A. (N. S.) 152, the Supreme Court of Vermont held that where, under stress of weather, a vessel was without permission moored to a private dock at an island in Lake Champlain owned by the defendant, the plaintiff was not guilty of trespass, and that the defendant was responsible in damages because his representative upon the island unmoored the vessel, permitting it to drift upon the shore, with resultant injuries to it. If, in that case, the vessel had been permitted to remain, and the dock had suffered an injury, we believe the shipowner would have been held liable for the injury done.

Theologians hold that a starving man may, without moral guilt, take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such person to pay the value of the property so taken when he became able to do so. And so public necessity, in times of war or peace, may require the taking of private property for public purposes; but under our system of jurisprudence compensation must be made.

Let us imagine in this case that for the better mooring of the vessel those in charge of her had appropriated a valuable cable lying upon

the dock. No matter how justifiable such appropriation might have been, it would not be claimed that, because of the overwhelming necessity of the situation, the owner of the cable could not recover its value.

This is not a case where life or property was menaced by any object or thing belonging to the plaintiffs, the destruction of which became necessary to prevent the threatened disaster. Nor is it a case where, because of the act of God, or unavoidable accident, the infliction of the injury was beyond the control of the defendant, but is one where the defendant prudently and advisedly availed itself of the plaintiffs' property for the purpose of preserving its own more valuable property, and the plaintiffs are entitled to compensation for the injury done.

Order affirmed.

LEWIS, J. (dissenting). I dissent. It was assumed on the trial before the lower court that appellant's liability depended on whether the master of the ship might, in the exercise of reasonable care, have sought a place of safety before the storm made it impossible to leave the dock. The majority opinion assumes that the evidence is conclusive that appellant moored its boat at respondents' dock pursuant to contract, and that the vessel was lawfully in position at the time the additional cables were fastened to the dock, and the reasoning of the opinion is that, because appellant made use of the stronger cables to hold the boat in position, it became liable under the rule that it had voluntarily made use of the property of another for the purpose of saving its own.

In my judgment, if the boat was lawfully in position at the time the storm broke, and the master could not, in the exercise of due care, have left that position without subjecting his vessel to the hazards of the storm, then the damage to the dock, caused by the pounding of the boat, was the result of an inevitable accident. If the master was in the exercise of due care, he was not at fault. The reasoning of the opinion admits that if the ropes, or cables, first attached to the dock had not parted, or if, in the first instance, the master had used the stronger cables, there would be no liability. If the master could not, in the exercise of reasonable care, have anticipated the severity of the storm and sought a place of safety before it became impossible, why should he be required to anticipate the severity of the storm, and, in the first instance, use the stronger cables?

I am of the opinion that one who constructs a dock to the navigable line of waters, and enters into contractual relations with the owner of a vessel to moor the same, takes the risk of damage to his dock by a boat caught there by a storm, which event could not have been avoided in the exercise of due care, and further, that the legal status of the parties in such a case is not changed by renewal of cables to keep the boat from being cast adrift at the mercy of the tempest.

JAGGARD, J. I concur with LEWIS, J.

616 242

GILMAN v. EMERY.

SUPREME COURT OF MAINE, 1867.

[*Reported* 54 *Me.* 460.]

ON EXCEPTIONS.

TRESPASS to recover damages to plaintiff's horse and wagon.

It appeared that the plaintiff started with his brother to drive two heifers, from his stable, in Waterville, to another town. As they were passing defendant's premises, leading plaintiff's horse attached to his wagon, and driving the heifers, one of the latter turned and ran back. Whereupon, the plaintiff hitched his horse to a shade tree, twenty-two inches in diameter, standing upon the defendant's premises, but within the limits of the highway, and went back for his heifer. The defendant seeing plaintiff's horse so hitched, removed him and hitched him to a post a few feet from the tree. When the plaintiff was returning for his horse, some twenty minutes afterwards, he saw his horse running through the streets, with halter dragging, and the wagon broken. There was no evidence as to the precise manner in which the defendant hitched the horse, or as to how he was freed from the post.

Plaintiff moved to amend by adding a count alleging a wrongful taking by the defendant, a negligent use and control of said horse and wagon, whereby they became injured and unfit for use. The presiding judge overruled the motion, and ordered a nonsuit, and the plaintiff alleged exceptions.

WALTON, J. Travelers have no right to hitch horses to shade trees. It is well known that most horses have a propensity to gnaw whatever they are hitched to. Hitching posts of the hardest wood have to be capped with iron or they are soon so badly gnawed as to be ruined. Too many beautiful shade trees, planted at great expense and watched for many years with anxious care, have been destroyed by having horses hitched to them, not to know that the practice is exceedingly dangerous. When, therefore, the owner of a shade tree finds a horse hitched to it, he may immediately remove him to a place of safety, and such removal will not be a trespass.

In this case the defendant found a horse hitched to one of his shade trees. He unhitched him and led him a few feet and hitched him to a post set in the ground on purpose to hitch horses to. This was not an act of trespass, and probably the plaintiff would not have complained of it, but for the fact that his horse afterwards broke loose from the post and ran away and broke his wagon. But there is no evidence that the defendant did not use ordinary care in hitching the horse, and the plaintiff's writ does not charge him with negligence; it simply charges

him with trespass *vi et armis*, in taking and carrying away the horse, buggy, etc.

The presiding judge, being of opinion that the action could not be maintained, ordered a nonsuit, to which the plaintiff excepted. We cannot doubt that the nonsuit was rightly ordered.

The plaintiff moved for leave to amend his declaration by inserting a new count charging the defendant with negligence in not hitching the horse securely. Leave was not granted. To this refusal the plaintiff also excepted. Exceptions do not lie to the refusal of a judge to allow an amendment, unless the bill of exceptions show that he ruled, as matter of law, that the proposed amendment was one which could not be allowed. The bill of exceptions does not show that he so ruled in this case. It is to be presumed therefore that he ruled, as matter of discretion, not to allow the amendment, because under the circumstances justice would not in his opinion be thereby promoted. To such a ruling, as before stated, exceptions do not lie; and it is not important to determine whether the proposed amendment was one which could legally be made or not.

Exceptions overruled.

APPLETON, C. J., CUTTING, DICKERSON, BARROWS, and TAPLEY, JJ., concurred.

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617 Z d 2

NESBETT *v.* WILBUR.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1900.

[*Reported* 177 *Mass.* 200.]

HOLMES, C. J. This is an action for killing a dog. The judge before whom the case was tried found that the dog was engaged in killing the defendant's hens, that the defendant rightly believed that there was no other way to save them than to kill the dog, and that he was justified in doing so. The plaintiff excepted to a refusal to rule that our statutes took away the common law, and that, not having complied with the statutes, the defendant was liable.

The provision in Pub. Sts. c. 102, § 94, does not take away the rights of the defendant at common law. That section gives a right to "any person" to kill a dog found out of the inclosure or immediate care of its owner, worrying neat cattle, sheep, or lambs. Its object is "to rid society of a nuisance by killing the dog." Cummings *v.* Perham, 1 Met. 555, 557. Blair *v.* Forehand, 100 Mass. 136, 143. It does not touch the rights of an owner in defense of his property. Our legislation as a whole discloses no scheme of a nature to exclude those rights.

Taken strictly, the exceptions do not open a question concerning the common law, nor is one argued. We need say no more than that the finding for the defendant was justified. No doubt such a justification as that relied on depends upon a number of variable facts: the imminence and nature of the danger, the kind of property in peril, from whom or what the danger proceeds, the relative importance of the harm threatened and that which is done in defense. Compare, for instance, Clark *v.* Keliher, 107 Mass. 406, with the cases cited below. But these considerations and comparisons are all eliminated by the judge's finding that the defendant was justified. There is nothing which enables us to say or leads us to think that he was wrong. Wadhurst *v.* Damme, Cro. Jac. 45. Wright *v.* Ramscot, 1 Wms. Saund. 84. Barrington *v.* Turner, 3 Lev. 28. Janson *v.* Brown, 1 Camp. 41. Livermore *v.* Batchelder, 141 Mass. 179. Leonard *v.* Wilkins, 9 Johns. 233. Brill *v.* Flagler, 23 Wend. 354. Aldrich *v.* Wright, 53 N. H. 398. Hubbard *v.* Preston, 90 Mich. 221.

Exceptions overruled.

619772

GOODWIN *v.* AVERY.

SUPREME COURT OF ERRORS, CONNECTICUT, 1858.

[*Reported* 26 *Conn.* 585.]

TRESPASS, for an assault and battery, tried to the jury on the general issue.

The plaintiff and defendant were hack-drivers. A Mr. Prince, in making preparations for the funeral of a child, had employed one Potter to superintend the arrangements for the funeral and to procure the necessary carriages, and Potter, in pursuance of his directions, had engaged the defendant, among others, to attend with his hack. Previous to the funeral, a brother of Mr. Prince, without the knowledge of Potter, had engaged the plaintiff to attend the funeral with his carriage. The plaintiff and defendant both attended with their carriages, and the injuries which the plaintiff claimed to have received, were the consequences of a strife between them to obtain a certain position in the funeral procession.

The defendant offered evidence to prove, that he arrived at the funeral in his carriage previous to the arrival of the plaintiff, and took a position in the public street in front of the house where the funeral was to be held; that a person by the name of Licet, the driver of another carriage, took a position behind the defendant; that while the defendant and Licet were thus arranged in line in the procession that was to be formed, Potter gave directions to the defendant to drive into and let Licet take his place, and gave directions to the defendant

to take the place next behind Licet; that thereupon the defendant turned his carriage round for the purpose, and while he was thus turning, the plaintiff arrived and occupied the place with his carriage, — Potter at this time having gone into the house; that thereupon the defendant informed the plaintiff that Potter, who had charge of the funeral arrangements, had assigned to him the place the plaintiff then occupied, and requested him to back his team and let him take the place; that the plaintiff refused to leave the place or let the defendant occupy the same; that the defendant's carriage was at this time in an angling position with a line running with the street, with the heads of his horses in advance of the heads of the plaintiff's horses, and near the back of Licet's carriage; that while in this position the defendant was standing by the heads of his horses, holding them by the bits, and the plaintiff was sitting in his carriage, when the defendant requested Licet, without the knowledge of the plaintiff, to drive his carriage forward; that Licet drove forward, and the defendant caused his horses to move forward at the same instant to occupy the place left vacant; that after his horses began to move forward to occupy the place, the plaintiff discovered his design and began whipping his, the plaintiff's, horses; that the plaintiff's horses started forward, and the defendant being at the time in advance of them with his own horses, the horses of the plaintiff struck the defendant, and the pole of the plaintiff's carriage hit him in the back, hurting him considerably; that thereupon the defendant took the horses of the plaintiff by the bridle to keep them from being driven by the plaintiff upon him; that thereupon the plaintiff commenced beating him with his whip over the head and shoulders, and that in order to protect himself from the attack of the plaintiff, he committed the acts of which the plaintiff complained, doing no more than was reasonably necessary, under the circumstances, for his self-defense. The plaintiff offered evidence to prove, that after he had occupied the place behind Licet with his carriage, and when the defendant requested him to leave the place and let him occupy the same, he informed the defendant that he would leave the place if Potter should so direct; and that when Licet began to move his carriage forward, he caused his own horses to move forward at the same time, and that the defendant thereupon seized his, the plaintiff's, horses by the bridle and forced them back, to prevent the plaintiff from occupying the place left vacant by Licet; and that if he struck the defendant with his whip, it was unintentional. Potter did not know that the plaintiff had been engaged, or had arrived to attend the funeral, until after the affray.

Upon the various claims of the parties the court charged the jury substantially as follows: — "It seems admitted in this case that an assault and battery was committed by the defendant upon the plaintiff, for which the defendant would be responsible in damages, unless justified upon the principle of self-defense. In such cases it becomes

important to ascertain, if we can, which party was in the right, and which in the wrong, in the commencement of the affray. The parents of the deceased child had the right to a reasonable occupancy of the public street in front of their house, for the purpose of forming the funeral procession of their child. The use and occupancy of the carriages they had employed being theirs for the occasion, they consequently had the right to direct in what order those carriages should be placed in the procession; and the drivers of the carriages, being themselves in their employ, were under obligations to conform to their directions. The parents, having thus the control of the carriages they had employed, might engage the services of another (as is usual on such occasions), to make those directions for them; and the directions of the person thus employed would be considered as the directions of the parents. It is admitted in this case that Potter was thus employed, and the fact was known by the plaintiff and the defendant previously to the affray. You will then inquire, in the first place, whether Potter had directed the defendant to take the place in the procession next after Licet. If he had so directed, and the defendant informed the plaintiff to that effect, it was the duty of the plaintiff to have allowed the defendant to occupy the place; and when Licet moved his carriage forward, and the defendant proceeded to occupy the place thus left vacant, if the plaintiff drove his carriage forward to prevent the defendant from thus occupying the place, he was in the wrong, and I think the defendant would be justified in gently taking the horses of the plaintiff by the bridle and stopping them, if he did no more; and if the plaintiff then proceeded to inflict an assault and battery upon the defendant, the defendant might repel the assault, doing no more than was reasonably necessary, under the circumstances, to defend himself. If the defendant carried his defense further than was reasonably necessary under the circumstances, he would be liable for the excess. If you find that Potter had not directed the defendant to occupy the place next behind Licet, then, in order to ascertain which party was in the wrong in the commencement of the affray, you will consider which party first proceeded to violence. Under ordinary circumstances the right of one person to the public highway, for public highway purposes, is as good as that of another. The highway is for the public — for one and all. But when one person occupies a particular part of the highway for highway purposes, he has an exclusive right to that part of the highway a reasonable length of time, under all the circumstances. Again, under ordinary circumstances, if two persons in carriages seek to occupy a part of the highway which, as yet, is unoccupied by either, the party who can peaceably occupy the place first, will be entitled to it for the time being; but he would not be justified in resorting to violence, either upon the person or property of the other, in order to occupy the place first. The one would not be justified in driving his horses upon the other, in order to occupy the place first; neither would the

other be justified in seizing the horses of the first and forcing them back for the same purpose. The party, under such circumstances, who first resorted to force and violence, would be in the wrong, and that violence might be lawfully resisted by the other, doing no more than was reasonably necessary, under the circumstances, to defend himself; while the other, being in the wrong, would be responsible in damages for whatever injury he might occasion, while his adversary kept within the proper limits of self-defense."

The jury returned a verdict for the defendant, and the plaintiff moved for a new trial for error in the charge of the court.

STORRS, C. J. No complaint is made of the latter part of the charge below, which was founded on the supposition that, at the time of the affray between the parties, the part of the highway where it occurred was not in the occupation of any person, and that the parties were struggling for the possession of it. The argument before us has proceeded on the assumption that Mr. Prince was then, by his servants, the drivers of the carriages who were engaged by him to attend the funeral of his child, in the occupancy of the place, for the purpose of forming the procession on that occasion; and that the order in which the carriages should be formed in the procession was by him confided to Mr. Potter, who, it is admitted, became thereby his agent for that purpose, and whose directions in respect to it were therefore in law those of Mr. Prince himself. The latter being thus in the possession of that part of the highway, for what was clearly a lawful purpose, had a right, either personally or through Mr. Potter, to direct as to the places in the procession which the carriages engaged by him should occupy, and the drivers therefore had a right to follow those directions; and if, in conforming or endeavoring to conform to them, they were prevented from doing so or obstructed by the plaintiff (who was not in the employ of Mr. Prince or acting by his direction, and therefore had no right to interfere with him or his servants in these funeral arrangements), they had a right to oppose such acts of the plaintiff, or to defend themselves against any injury from him, by as much force as was necessary in order to enable themselves to occupy the place in the procession assigned to them. The proper inquiries on this part of the case, were — first, whether the defendant was directed by Potter to occupy the place, and was, while occupying or endeavoring to occupy it, obstructed by the plaintiff, — and secondly, if he was so disturbed, whether he used unnecessary force in obtaining or keeping the place. And these questions were submitted by the court below, and with great clearness, to the jury. In one respect, perhaps, the charge was over-favorable to the plaintiff. It required the defendant to prove, not only that Potter had directed the defendant to occupy the place for which the parties were struggling, but also that the defendant had informed the plaintiff to that effect. It is questionable whether the plaintiff had strictly any right to such information from the defendant;

for if the latter had, by Potter's directions, a right to take that place, it would seem that he could not lawfully be deprived of it by the plaintiff, whether it was made known to him by the defendant or not. This point, however, has not been made, and it is unnecessary to notice it further. We discover no error in the charge of which the plaintiff can complain, and therefore do not advise a new trial.

In this opinion the other judges concurred.

New trial not advised.

SECTION IV.

Protection from Consequences of Permitted Acts.

6 23 42

BROWN v. KENDALL.

SUPREME JUDICIAL COURT, 1850.

[*Reported* 6 *Cush.* 292.]

THIS was an action of trespass for assault and battery, originally commenced against George K. Kendall, the defendant, who died pending the suit, and his executrix was summoned in.

It appeared in evidence, on the trial, which was before *Wells*, C. J., in the court of common pleas, that two dogs, belonging to the plaintiff and the defendant, respectively, were fighting in the presence of their masters; that the defendant took a stick about four feet long, and commenced beating the dogs in order to separate them; that the plaintiff was looking on, at the distance of about a rod, and that he advanced a step or two towards the dogs. In their struggle, the dogs approached the place where the plaintiff was standing. The defendant retreated backwards from before the dogs, striking them as he retreated; and as he approached the plaintiff, with his back towards him, in raising his stick over his shoulder, in order to strike the dogs, he accidentally hit the plaintiff in the eye, inflicting upon him a severe injury.

Whether it was necessary or proper for the defendant to interfere in the fight between the dogs; whether the interference, if called for, was in a proper manner, and what degree of care was exercised by each party on the occasion; were the subject of controversy between the parties, upon all the evidence in the case, of which the foregoing is an outline.

The defendant requested the judge to instruct the jury, that "if both the plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care and the plaintiff was not, or if at that time both plaintiff and

defendant were not using ordinary care, then the plaintiff could not recover."

The defendant further requested the judge to instruct the jury, that, "under the circumstances, if the plaintiff was using ordinary care and the defendant was not, the plaintiff could not recover, and that the burden of proof on all these propositions was on the plaintiff."

The judge declined to give the instructions, as above requested, but left the case to the jury under the following instructions: "If the defendant, in beating the dogs, was doing a necessary act, or one which it was his duty under the circumstances of the case to do, and was doing it in a proper way; then he was not responsible in this action, provided he was using ordinary care at the time of the blow. If it was not a necessary act; if he was not in duty bound to attempt to part the dogs, but might with propriety interfere or not as he chose; the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word inevitable not in a strict but a popular sense."

"If, however, the plaintiff, when he met with the injury, was not in the exercise of ordinary care, he cannot recover, and this rule applies, whether the interference of the defendant in the fight of the dogs was necessary or not. If the jury believe, that it was the duty of the defendant to interfere, then the burden of proving negligence on the part of the defendant, and ordinary care on the part of the plaintiff, is on the plaintiff. If the jury believe, that the act of interference in the fight was unnecessary, then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of the plaintiff, is on defendant."

The jury under these instructions returned a verdict for the plaintiff; whereupon the defendant alleged exceptions.

SHAW, C. J. This is an action of trespass, *vi et armis*, brought by George Brown against George K. Kendall, for an assault and battery; and the original defendant having died pending the action, his executrix has been summoned in. The rule of the common law, by which this action would abate by the death of either party, is reversed in this commonwealth by statute, which provides that actions of trespass for assault and battery shall survive. Rev. Sts. c. 93, § 7.

The facts set forth in the bill of exceptions preclude the supposition, that the blow, inflicted by the hand of the defendant upon the person of the plaintiff, was intentional. The whole case proceeds on the assumption, that the damage sustained by the plaintiff, from the stick held by the defendant, was inadvertent and unintentional; and the case involves the question how far, and under what qualifications, the party by whose unconscious act the damage was done is responsible for it. We use the term "unintentional" rather than involuntary, because in some of the cases, it is stated, that the act of holding and using

a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a voluntary act, although its particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act.

It appears to us, that some of the confusion in the cases on this subject has grown out of the long-vexed question, under the rule of the common law, whether a party's remedy, where he has one, should be sought in an action of the case, or of trespass. This is very distinguishable from the question, whether in a given case, any action will lie. The result of these cases is, that if the damage complained of is the immediate effect of the act of the defendant, trespass *vi et armis* lies; if consequential only, and not immediate, case is the proper remedy. Leame *v.* Bray, 3 East, 593; Hugget *v.* Montgomery, 2 N. R. 446, Day's Ed. and notes.

In these discussions, it is frequently stated by judges, that when one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question, whether trespass and not case will lie, assuming that the facts are such, that some action will lie. These dicta are no authority, we think, for holding, that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither wilful, intentional, or careless. In the principal case cited, Leame *v.* Bray, the damage arose from the act of the defendant, in driving on the wrong side of the road, in a dark night, which was clearly negligent if not unlawful. In the course of the argument of that case (p. 595), Lawrence, J., said: "There certainly are cases in the books, where, the injury being direct and immediate, trespass has been holden to lie, though the injury was not intentional." The term "injury" implies something more than damage; but, independently of that consideration, the proposition may be true, because though the injury was unintentional, the act may have been unlawful or negligent, and the cases cited by him are perfectly consistent with that supposition. So the same learned judge in the same case says (p. 597), "No doubt trespass lies against one who drives a carriage against another, whether done wilfully or not." But he immediately adds, "Suppose one who is driving a carriage is negligently and heedlessly looking about him, without attending to the road when persons are passing, and thereby runs over a child and kills him, is it not manslaughter? and if so, it must be trespass; for every manslaughter includes trespass;" showing what he understood by a case not wilful.

We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the *intention* was unlawful, or that the defendant was *in fault:* for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. 2 Greenl. Ev., §§ 85 to 92; Wakeman *v.* Robinson, 1 Bing. 213. If, in

the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. Davis v. Saunders, 2 Chit. R. 639; Com. Dig. Battery, A (Day's Ed.) and notes; Vincent v. Stinehour, 7 Verm. 69. In applying these rules to the present case, we can perceive no reason why the instructions asked for by the defendant ought not to have been given; to this effect, that if both plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time, both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover.

In using this term, ordinary care, it may be proper to state, that what constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. A man, who should have occasion to discharge a gun, on an open and extensive marsh, or in a forest, would be required to use less circumspection and care, than if he were to do the same thing in an inhabited town, village, or city. To make an accident, or casualty, or as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.

We are not aware of any circumstances in this case, requiring a distinction between acts which it was lawful and proper to do, and acts of legal duty. There are cases, undoubtedly, in which officers are bound to act under process, for the legality of which they are not responsible, and perhaps some others in which this distinction would be important. We can have no doubt that the act of the defendant in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act, which he might do by proper and safe means. If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in his eye, and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie. Or if the defendant was chargeable with some negligence, and if the plaintiff was also chargeable with negligence, we think the plaintiff cannot recover without showing that the damage was caused wholly by the act of the defendant, and that the plaintiff's own negligence did not contribute as an efficient cause to produce it.

The court instructed the jury, that if it was not a necessary act, and the defendant was not in duty bound to part the dogs, but might with propriety interfere or not as he chose, the defendant was responsible

for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word not in a strict but a popular sense. This is to be taken in connection with the charge afterwards given, that if the jury believed, that the act of interference in the fight was unnecessary (that is, as before explained, not a duty incumbent on the defendant), then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of plaintiff, was on the defendant.

The court are of opinion that these directions were not conformable to law. If the act of hitting the plaintiff was unintentional, on the part of the defendant, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it. 2 Greenl. Ev., § 85; Powers *v.* Russell, 13 Pick. 69, 76; Tourtellot *v.* Rosebrook, 11 Met. 460.

Perhaps the learned judge, by the use of the term extraordinary care, in the above charge, explained as it is by the context, may have intended nothing more than that increased degree of care and diligence, which the exigency of particular circumstances might require, and which men of ordinary care and prudence would use under like circumstances, to guard against danger. If such was the meaning of this part of the charge, then it does not differ from our views, as above explained. But we are of opinion, that the other part of the charge, that the burden of proof was on the defendant, was incorrect. Those facts which are essential to enable the plaintiff to recover, he takes the burden of proving. The evidence may be offered by the plaintiff or by the defendant; the question of due care, or want of care, may be essentially connected with the main facts, and arise from the same proof; but the effect of the rule, as to the burden of proof, is this, that when the proof is all in, and before the jury, from whatever side it comes, and whether directly proved, or inferred from circumstances, if it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then unless it also appears to the satisfaction of the jury, that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover.[1]

New trial ordered.

[1] See Morris *v.* Platt, 21 Conn. 75. — Ed.

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MOSES v. DUBOIS.

COURT OF APPEALS, SOUTH CAROLINA, 1838.

[*Reported* 6 *Cush.* 292.]

THIS was an action for false imprisonment, against the captain of a steamboat, for carrying Sol. Moses (deputy sheriff), to Norfolk, against his will. The plaintiff had a bail writ of Squire & Rogers *v.* one Dickerson, who was a passenger in defendant's steamboat; he went on board to arrest Dickerson, just as the steamboat was about to leave the wharf; informed the captain that he had a prisoner on board, and requested him to wait until he obtained assistance. But the usual time of departure having passed, the boat went into the stream (some distance from the wharf), and stopped. The plaintiff served the writ, but Dickerson resisted, and the plaintiff demanded assistance of the defendant and the passengers, but they refused their aid. He then demanded to go ashore for assistance. This also the captain refused, but offered to send him and his prisoner ashore; but as the plaintiff could not take Dickerson with him, he declined going. The captain then departed for Norfolk. When opposite Fort Moultrie, the plaintiff requested to be sent ashore; but the captain answered it was then too late; and took him to Norfolk and back, for which the plaintiff was required to pay $40 passage money. In the meantime he lost the serving of writs, &c., which was estimated at $50. He was gone about two weeks, and demanded vindictive damages, for such violation of his personal liberty. No actual violence to his person was offered.

His Honor charged the jury.

1st. That neither the captain nor passengers, were under any legal obligation to assist the deputy sheriff in taking Dickerson, under the civil process of a bail writ, although they might have been justified, if they had chosen so to do.

2d. That there being no positive violence offered to the person of the plaintiff, the jury could not find damages against the captain, unless he had wilfully taken the plaintiff from his proximity to the wharf, where he might, perhaps, have obtained assistance of the sheriff's officers, or of other persons, and had done this with a view to prevent or lessen the chances of such assistance; that in this way, he might have connived at the escape and promoted the detention of the plaintiff, so as to constitute his imprisonment — of this, the jury were to judge.

3d. That although the captain had offered to send the plaintiff and his prisoner ashore, after the steamer had got into the stream, and although the plaintiff had refused to go without Dickerson, whom he could not command; yet, as the captain afterwards refused to land the plaintiff ashore, when he desired it (opposite Fort Moultrie), his conduct afforded some evidence of management to detain him, and to

carry him to Norfolk, against his will. Which management, if the jury believed it from the whole conduct of the captain, might amount to a false imprisonment, and support the action, although no violence was done to the person. Finally, that although the defendant was in no way bound to assist the deputy sheriff, and had conducted civilly enough, that his swinging off the boat from the wharf so quickly, after the plaintiff announced his business — and his afterwards refusing to send him ashore, savored of a disposition to frustrate his efforts, or might arise from a collusion with Dickerson to favor his escape. But the jury were to judge whether it amounted in fact to wilful and unlawful detention, or false imprisonment, and if so, to find for the plaintiff; otherwise for the defendant.

The jury returned a verdict of $100.

The defendant appealed, and moved for a new trial, on the following grounds:

1st. The defendant was under no obligation to postpone his voyage, until the plaintiff should think fit to leave his vessel.

2d. His Honor charged the jury that they might find for the plaintiff, on the ground of collusion between the defendant and Dickerson, and left it to the jury to say whether there was or was not collusion; whereas, it is respectfully submitted, that as no evidence of collusion was offered, nor even any from which collusion might be inferred, the only question proper to be left to the jury was, whether the defendant, before he proceeded on his voyage, allowed the plaintiff a fair opportunity of deciding whether he would go ashore or not.

3d. The verdict is palpably against evidence, and opposed to the plainest rules of justice.

EARLE, J., delivered the opinion of the court.

The lines of a separation between the injuries which are redressed by actions of trespass *vi et armis*, and those which are redressed by actions on the case, are often so slightly defined as to be almost imperceptible. But it is oftener difficult to distinguish between injuries that are immediate and such as are consequential, than such as are committed with force, and such as are without force. The essential and invariable ground of separation between trespass and case, is the force which is always necessary to sustain an action of trespass *vi et armis*, whether to the person or to the property. That the evidence in this case would authorize a jury to give damages, may be conceded without deciding the question, for it is not every injury *ex delicto* that will sustain trespass: and the defendant may have been actuated by the worst motives without making himself liable in this form of action. Every unlawful restraint of personal liberty is an imprisonment, whether accompanied by corporal touch or not — whether in a house, in a ship, or in the street. But force of some sort must be used, and it must be a detention against the will, and it is indispensable that these two circumstances should unite. The force may be exhibited in a variety of ways

without actual assault or corporal touch — by locking a door after enticing one within, and refusing to open it for his departure; by setting sail or pushing off from shore, having one on board, and refusing to allow him to go ashore; or by detaining one on the highway by threats of personal violence if he departed. And it is equally essential that the person should be detained against his will; for if he voluntarily place himself in a situation where another may lawfully do that which has the effect of restraining liberty, especially if he refuse to depart when he may, he cannot complain that he is unlawfully imprisoned against his will. A sheriff's officer goes to the house of A on the evening of an entertainment, with a bail process against one of his guests, and enters, as he lawfully may, and makes the arrest, A refusing to assist him, but offering no hindrance; being unable to remove his prisoner, he chooses to remain until the close of the entertainment, expecting then to accomplish his purpose on the departure of the guests; but the prisoner being on a visit there, remains. The officer being informed that the doors are about to be closed, is requested to depart with his prisoner if he can take him, else without him; but he is unable to take, and refuses to go without him. If A should lock his doors and retire to rest, could the officer complain of false imprisonment if A should refuse to rise at a late hour of the night at his request, to open the door? I should think not. If a man enters a tavern and continues there all night against the will of the landlord, it is a trespass — could he complain if the landlord shuts his door upon him? The general rule is, that a trespass will not lie for a mere nonfeasance; and it seems to follow from that proposition, that when an act has been done, in the first instance lawful in itself, it cannot be rendered unlawful *ab initio*, except by some positive act incompatible with the exercise of the legal right to do the first act. 20 John. Rep. 429, 15 id. 401. In the case made by the evidence, it does not appear that the plaintiff was carried from the shore against his will, but the reverse. The destination of the boat was known — the accustomed hour of departure was passed; the boat was in the act of getting under way; at that moment the plaintiff chose to go on board, to arrest a person on a bail process, evidently under a mistaken impression as to the extent of his authority; and seeing the boat leaving the wharf, he chose to remain. Here, then, there was no unlawful detention, according to the principles I have laid down: the defendant was in the discharge of his known and accustomed duty, and therefore in the performance of a lawful act, and the plaintiff was not detained against his will. At what time did the false imprisonment commence? After the boat had proceeded into the stream some distance from the wharf, the defendant came and proposed to the plaintiff to send him ashore with his prisoner, if he could take him, else to send him alone. The plaintiff refused to go unless the defendant would aid him in carrying his prisoner. It need not be repeated that this the defendant was not bound to do. It was his duty to interpose no obstacle

to the arrest or removal of the prisoner, but rather to afford such facilities as he could to the service of legal process. This he seems to have done, and more could hardly have been expected. On the refusal of the plaintiff to go ashore the defendant proceeded on his voyage, one on which the plaintiff knew the boat was in the act of departing when he went aboard. This was also the accustomed duty, the office of the defendant, and was therefore a lawful act.

If the defendant was not bound to aid in the arrest and removal of the prisoner, I do not perceive that he was bound either to delay his voyage, or put back his boat, to enable the plaintiff to procure assistance. When the boat had arrived at the mouth of the harbor near Sullivan's Island, the plaintiff demanded to be put ashore, which the defendant then refused; here commenced the detention of the plaintiff against his will. Was it unlawful? I think it cannot be so held; the defendant only proceeded on his voyage. His refusal to send the plaintiff ashore at that time, which would have delayed his progress and put him to trouble, was a mere nonfeasance, which, if he had been guilty of no trespass up to that time, did not render him a trespasser *ab initio:* it was not a positive act, incompatible with the legal exercise of the right to proceed from the wharf, the plaintiff being on board.

If the plaintiff, as the case was put to the jury, had wilfully put off from the shore, to prevent assistance, and to aid the escape of Dickerson, he might, perhaps, be liable to the creditor of Dickerson. But I do not perceive how a connivance in the case of Dickerson can be united with a deliberate purpose of detaining the plaintiff and carrying him to Norfolk against his will. The most effectual mode of aiding the escape of Dickerson, would seem to be to hasten the departure of Moses; besides, a deliberate purpose of carrying him to Norfolk cannot be reconciled with the offer to send him ashore: and therefore could not have existed at the time of his leaving the wharf, if he did it ever so hastily. If the defendant exhibited an anxiety to aid the escape of Dickerson, and hastened to leave the wharf and get into the stream, to prevent the plaintiff from obtaining help, it was improper. The court has striven to sustain the verdict, but can find no precedent of such an action. The principal authority cited by counsel from Blackstone, and referred to by Chitty, is this: "Injuries to the person may be committed, 1st, by threats and menaces of bodily hurt, through fear of which, a man's business is interrupted," and cites Finch, L., 202, Reg. 104. I have not been able to consult these last: I suppose it to be of actual personal detention from customary employment, by threats and putting in fear; and this comes up to what I have before said of the kind of force which may be used. But mere dicta in the old books sometimes mislead and sometimes have ceased to be of authority. It is said in Viner, citing Brooke, "if a man says he will cut off my arm, it is an assault;" "if a man says to me that if I will not cease my suit which I have against him, he will beat me — this is an assault." But it is well settled now,

that no mere words whatsoever will constitute an assault. We cannot believe that the extensive mischiefs will ensue, in the administration of justice, which have been anticipated, should we set aside this verdict; such a conjuncture of circumstances is not likely to occur again. The consequences have grown out of the mistake of the plaintiff, in supposing he had a right to call on bystanders to aid him in making the arrest. In like cases again, the sheriff's officer will only have to take with him such a force of followers as will enable him to overcome opposition.

Whatever may be the effect, we cannot overthrow the settled rules of pleading, and obliterate the settled forms of action, to suit the exigency in a particular case, or to avoid the possible consequence of a particular decision.

The motion for a new trial is granted.

REGINA v. LESLEY.

CROWN CASE RESERVED. 1860.

[*Reported Bell*, 220; 8 *Cox C. C.* 269.]

ERLE, C. J.[1] In this case the question is whether a conviction for false imprisonment can be sustained upon the following facts.

The prosecutor and others, being in Chili, and subjects of that state, were banished by the government from Chili to England.

The defendant, being master of an English merchant vessel lying in the territorial waters of Chili, near Valparaiso, contracted with that government to take the prosecutor and his companions from Valparaiso to Liverpool, and they were accordingly brought on board the defendant's vessel by the officers of the government and carried to Liverpool by the defendant under his contract. Then, can the conviction be sustained for that which was done within the Chilian waters? We answer no.

We assume that in Chili the act of the government towards its subjects was lawful; and although an English ship in some respects carries with her the laws of her country in the territorial waters of a foreign state, yet in other respects she is subject to the laws of that state as to acts done to the subjects thereof.

[1] The opinion only is given. In addition to the facts therein stated, the following may be useful: —

It appeared by the evidence for the prosecution that the prisoners requested the defendant to take them to Peru, which was near, offering to pay him what the Government of Chili paid him, but that the defendant refused, on the ground that his contract required him to carry the prisoners to Liverpool. They made no other request to be put ashore. The vessel touched at the Azores, and the defendant made holes in the boats to prevent the escape of the prisoners.

WATSON, B., who tried the case, directed a verdict of guilty, and reported the case to the Court for Crown Cases Reserved. — ED.

We assume that the government could justify all that it did within its own territory, and we think it follows that the defendant can justify all that he did there as agent for the government and under its authority. In Dobree *v.* Napier, 2 Bing. N. C. 781, the defendant, on behalf of the Queen of Portugal, seized the plaintiff's vessel for violating a blockade of a Portuguese port in time of war. The plaintiff brought trespass; and judgment was for the defendant, because the Queen of Portugal, in her own territory, had a right to seize the vessel and to employ whom she would to make the seizure; and therefore the defendant, though an Englishman seizing an English vessel, could justify the act under the employment of the Queen.

We think that the acts of the defendant in Chili become lawful on the same principle, and therefore no ground for the conviction.

The further question remains, Can the conviction be sustained for that which was done out of the Chilian territory? And we think it can.

It is clear that an English ship on the high sea, out of any foreign territory, is subject to the laws of England; and persons, whether foreign or English, on board such ship, are as much amenable to English law as they would be on English soil. In Regina *v.* Sattler, 1 D. & B. C. C. 525, this principle was acted on, so as to make the prisoner, a foreigner, responsible for murder on board an English ship at sea. The same principle has been laid down by foreign writers on international law, among which it is enough to cite Ortolan, "Sur la Diplomatie de la Mer," liv. 2. cap. 13.

The Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 267, makes the master and seamen of a British ship responsible for all offences against property or person committed on the sea out of her Majesty's dominions as if they had been committed within the jurisdiction of the Admiralty of England.

Such being the law, if the act of the defendant amounted to a false imprisonment he was liable to be convicted. Now, as the contract of the defendant was to receive the prosecutor and the others as prisoners on board his ship, and to take them, without their consent, over the sea to England, although he was justified in first receiving them in Chili, yet that justification ceased when he passed the line of Chilian jurisdiction, and after that it was a wrong which was intentionally planned and executed in pursuance of the contract, amounting in law to a false imprisonment.

It may be that transportation to England is lawful by the law of Chili, and that a Chilian ship might so lawfully transport Chilian subjects; but for an English ship the laws of Chili, out of the state, are powerless, and the lawfulness of the acts must be tried by English law.

For these reasons, to the extent above mentioned, the conviction is affirmed. *Conviction confirmed accordingly.*[1]

[1] For the extent to which the command of a military or naval superior officer will justify a criminal act, see Reg. *v.* Thomas, 1 Russ. Crimes, 731; Reg. *v.* Hutchinson, 9 Cox C. C. 555; U. S. *v.* Clark, 31 F. R. 710, *infra*. — Ed.

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THE BALMAIN NEW FERRY CO., LTD., *v.* ROBERTSON.

HIGH COURT OF AUSTRALIA, 1906.

[*Reported* 4 *Com. L. R.* 379.]

O'CONNOR, J. The material facts of this case may be shortly stated. The appellants carried on the business of a harbor steam ferry from the City of Sydney to Balmain, in connection with which they used a wharf and premises leased by them from the Harbor Trust Commissioners. Fares were not taken on the steamers or on the Balmain side, but were all collected on the Sydney wharf on the following system: On the street side of the wharf were two registering turnstiles, one for entry, the other for exit. The turnstiles did not quite fill up the opening in which they moved, there being a space of some eight and a half inches between the outer edge of the turnstiles and the bulkhead. For the purposes of this case it may be taken that there was no other way of entering or leaving the wharf on the land side except by the turnstiles. An officer of the company was stationed at each turnstile. Passengers entering the wharf paid one penny to the officer at the entry turnstile, were admitted, and had then the right to travel by the company's steamers to Balmain. Similarly passengers leaving the wharf, whether they had traveled from Balmain in the company's steamers or not, paid a penny to the officer at the exit turnstile and were allowed to pass through to the street. The turnstile in each case automatically registered the number of passengers passing through, and was thus a check upon the officers' cash takings. Two photographs were put in by the plaintiff, respondent, one showing the exterior, the other the interior of the wharf, from which it appeared that there was a notice board a few feet over the turnstiles, on which were painted the words, "Notice. A fare of one penny must be paid on entering or leaving the wharf. No exception will be made to this rule, whether the passenger has traveled by the ferry or not." The notice was so placed that in the daytime, at least, it would be difficult for a passenger giving reasonable attention to his surroundings to avoid seeing it. The photographs also showed a large gas lamp so situated that at night time, if alight, it would throw a full light on the notice, but there was no direct evidence either that it was generally lit at night or that it was alight on the evening of the occurrence.

On the night of 5th June, 1906, the respondent and a lady came to the wharf, and, with the intention of crossing to Balmain in one of the appellant's steamers, passed through the entrance turnstile, each paying a penny. When they had got to the water side of the wharf they

found that the steamer had gone, and, instead of waiting for the next, they determined to go to another ferry company's wharf and cross the harbor by another steamer to Balmain. The respondent, seeing no way of getting from the wharf into the street except by the turnstiles, asked one of the officers at the turnstiles to show him the way out. The officer replied that there was only one way out, and that was through the turnstile. The respondent then asked if he was expected to pay on going out, seeing that he had not traveled by the steamer. The officer replied in the affirmative, and told him that unless he did pay he would not be allowed to go out through the turnstile. The respondent denied the company's right to make the charge, or to make its payment a condition of his being permitted to pass through the turnstile. The officer then called his attention to the notice. After some further conversation the respondent endeavored to force his way through the eight and a half inch space between the entrance turnstile and the bulkhead, but was prevented from doing so by the appellant company's officers, who used force for that purpose. After some twenty minutes, during which the respondent continued to assert and the officers to deny his right to pass out through the turnstiles without payment, the respondent eventually, in spite of opposing force on the part of the officers, squeezed his way out between the exit turnstile and the bulkhead and gained the street. These facts constituted the assault and false imprisonment for which the respondent sued.

At the trial of the action the respondent obtained a verdict for £100 damages, and, on appeal, the Supreme Court granted a rule *nisi* for a new trial or a nonsuit or verdict for the defendants on the grounds (1) that His Honor was in error in directing the jury that the trespass complained of was not within the scope of the servants' authority; (2) that he was in error in directing that the defendants had no right to demand the second penny; and (3) that he should have directed the jury that, if they came to the conclusion that the company had done what was reasonable to give persons going on the wharf notice of the terms on which they were admitted, the jury were entitled to find that the plaintiff was bound by that notice. The rule was subsequently discharged with costs: Robertson *v.* Balmain New Ferry Co., Ltd.

From this decision, as to the second and third grounds of the rule *nisi*, the present appeal was brought by special leave, the court having refused to grant leave as to the first ground.

It is admitted on this appeal that the company are responsible for what was done by their officers, so that there is left for our decision substantially one question only, namely, whether, on the facts, the company are liable to the plaintiff for false imprisonment and assault. The legal position on which the plaintiff relies may be thus stated: He entered the wharf under a contract to be carried in the company's steamer from Sydney to Balmain. Before the contract was performed

he decided to abandon it, and, having no further business on the wharf, became entitled to pass out to the street through the turnstiles, or, if not through them, at least through the eight and a half inch space between the turnstile and the bulkhead. The company's officers by force prevented him from doing so, refused to allow him to pass out through the turnstile except on payment of a penny at the exit turnstile, and thus kept him imprisoned as a means of enforcing payment of that demand. He maintains that, even if he were bound to pay the extra penny as a matter of contract and it became a debt recoverable in the courts, the company could not thus take the law into their own hands and deprive him of his liberty in order to enforce payment. If that were an accurate statement of the position, the plaintiff's contention would be unanswerable. But it is not an accurate statement of the position. Undoubtedly it is not permissible for a creditor, except under due process of the law, to abridge the liberty of his debtor for the purpose of enforcing payment. But the abridgment of a man's liberty is not under all circumstances actionable. He may enter into a contract which necessarily involves the surrender of a portion of his liberty for a certain period, and if the act complained of is nothing more than a restraint in accordance with that surrender he cannot complain. Nor can he, without the assent of the other party, by electing to put an end to the contract, become entitled at once, unconditionally and irrespective of the other party's rights, to regain his liberty as if he had never surrendered it. A familiar instance of such a contract is that between a passenger and the railway company which undertakes to carry him on a journey. If the passenger suddenly during the journey decided to abandon it and to leave the train at the next station, being one at which the train was not timed to stop, he clearly could not be entitled to have the train stopped at that station. However much he might object, the railway company could lawfully carry him on to the next stopping place of that particular train. In such a case the passenger's liberty would be for a certain period restrained, but the restraint would not be actionable, because it is an implied term of such a contract that the passenger will permit the restraint of his liberty so far as may be necessary for the performance by the company of the contract of carriage according to the time table of that train. Or a person may conditionally, by his own act, place himself in such a position that he cannot complain of a certain restraint of his liberty. Take an illustration which was used in the course of the argument. Assume that the turnstiles on the company's wharf completely closed the opening between the bulkheads, that they were worked on the penny in the slot system, and would not open except when a penny, dropped in the slot, operated the mechanism. If under these circumstances the plaintiff, having opened the entry turnstile by his penny and entered the wharf, changed his mind about crossing in the company's steamers, and wished to return at once to the street, could he claim that he

was not bound to use the ordinary means of opening the exit turnstile by dropping in his penny, but was entitled to break his way through it, or to demand from the company's officers that they should specially unlock the apparatus to enable him to pass out? If, under the circumstances, the officers refused to comply with his request, could it possibly be contended that the company would be liable to an action for false imprisonment? *Prima facie*, no doubt, any restraint of a person's liberty without his consent is actionable. But, when the restraint is referable to the terms on which the person entered the premises in which he complains he was imprisoned, we must examine those terms before we can determine whether there has been an imprisonment which is actionable. The fallacy in the plaintiff's legal position lies in the assumption that, immediately he abandoned the contract to be carried to Balmain by the company's steamer, he was in the same position as if the wharf was one to which the public had free right of access, that, finding his exit barred by the turnstiles, he was entitled either to squeeze past them, or to demand from the company's officers that they should be specially released to let him through. Whether that assumption is or is not justifiable depends upon the terms on which the plaintiff was permitted to enter the wharf. In ascertaining those terms it must be remembered that the wharf was not a place to which the public had free right of access. If it had been so no one could legally place upon the wharf any bar or obstruction to the free entry or exit of any member of the public. But it was not a public place in that sense. It was private property. No one had a right to enter there without the company's permission, and they could impose on the members of the public any terms they thought fit as a condition of entering or leaving the premises. What were the terms on which the plaintiff entered the company's wharf? There was no express contract, and the terms must therefore be implied from the circumstances. In dealing with the circumstances I leave the question of the notice board out of consideration. In my view, it is immaterial whether the company did what was reasonable to direct public attention to the notice, or whether the plaintiff ever read it until his attention was called to it by the officer at the turnstile. But as to the material facts from which the contract must be implied there is no dispute. The plaintiff was aware that the only entrance to and exit from the wharf on the land side was through the turnstiles, and that, to quote his evidence, "When the turnstile was not released there was a complete barrier stretching across the whole entrance," in other words, entrance to and exit from the wharf were completely barred except when by the action of the officer in charge the turnstile was released. He also knew that the turnstiles were so constructed as to admit only persons entering the wharf through the entry turnstile, and only persons leaving the wharf through the exit turnstile, that the passing through of every passenger was automatically registered by the turnstile, and that the

automatic register was a check on the cash taken by the officer. He himself, in speaking to one of the officers, said, "If it is the question of putting out the tally of your turnstiles I can squeeze through there," referring to the eight and a half inch space before mentioned. Having traveled on many occasions backward and forward by the company's boats, and, as he says, paid his fare to the officers at the turnstiles, he must have been aware that the company's method of conducting their business was to release the turnstiles only on payment of a penny, and that in every case where there was a departure from that method "the tally of the turnstile," as he terms it, would be thrown out.

Such being the condition of the company's premises, and such being their method of carrying on their business, the plaintiff paid his penny to the officer and went through the entry turnstile on to the wharf. The first question is, what is the contract to be implied from the plaintiff's payment at and passing through the turnstiles under these circumstances? It is that in consideration of that payment the company undertook to carry him as a passenger to Balmain by any of their ferryboats from that wharf. That is the only contract which could be implied from those circumstances, and the plaintiff was permitted to enter the wharf for the purpose of that contract being performed. It is not denied that the company were ready to perform their part, but the plaintiff, as far as one party can do so, rescinded the contract and determined to go back from the wharf to the street. What then were his rights? They were, in my opinion, no more and no less than they would have been if he had landed from his own boat at the company's wharf. He was on private property. He had not been forced or entrapped there. He had entered it of his own free will and with the knowledge that the only exit on the land side was through the turnstile, operated as a part of the company's system of collecting fares in the manner I have mentioned. If he wished to use the turnstile as a means of exit he could only do so on complying with the usual conditions on which the company opened them. The company were lawfully entitled to impose the condition of a penny payment on all who used the turnstiles, whether they had traveled by the company's steamers or not, and they were under no obligation to make an exception in the plaintiff's favor. The company, therefore, being lawfully entitled to impose that condition, and the plaintiff being free to pass out through the turnstile at any time on complying with it, he had only himself to blame for his detention, and there was no imprisonment of which he could legally complain. Next, had he the right to force his way through the narrow space between the turnstile and the bulkhead? Clearly he had not. If the turnstile had filled the whole space between the bulkheads, it could not be contended that the plaintiff would have been entitled to break it open in order to pass through. The company's officers were, in my opinion, entitled to regard the turnstile as block-

ing the whole space, not only for the necessary protection of the mechanism of the turnstiles from injury, but also because it was a necessary part of their system of collecting fares on entry and exit that the turnstile should be an effective barrier against entry and exit of any person except on the company's conditions. They were, therefore, entitled to prevent the plaintiff from squeezing through the space in question, and were justified in meeting the plaintiff's forcible attempt with as much force as was reasonably necessary to defeat it. It is not alleged that they did more, and any assault they may have committed on the plaintiff under these circumstances was justified. In this connection I may observe that it is not necessary to determine whether or not this justification is, strictly speaking, open to the company on the pleadings. The case has been conducted all through on the footing that it is open, and, if it were necessary, the court would make any amendment required to formally shape the issues in accordance with the way in which both parties regarded them at the trial. . . . Taking then, the whole facts in this case together, the plaintiff, in my opinion, was not entitled to succeed, and the verdict which the jury returned in his favor must be set aside. The only remaining question is, whether this court should grant a new trial, or order the verdict to be entered for the defendants. The court may make any order which the Supreme Court ought to have made in the first instance. That court ought, in my opinion, to have directed a verdict to be entered for the defendants. All the material facts were before them as they have been before us. It is impossible that any jury could on those facts find a verdict for the plaintiff which could stand for one moment if questioned. The verdict ought therefor, to have been entered for the defendants, and this court must now order accordingly that the verdict for the plaintiff be set aside and judgment be entered for the defendants.

639 442

HERD v. WEARDALE STEEL, COAL & COKE CO., LTD.

COURT OF APPEAL, 1913.

[*Reported* (1913) 3 *K. B.* 771.]

BUCKLEY, L. J. The plaintiff is a coal miner. The defendants are the colliery company in whose employment he was, and the manager of the colliery and an overman at the colliery. The action is brought for damages for false imprisonment. The plaintiff by his particulars says that the defendants "by their orders wrongfully prevented the plaintiff from using, and wrongfully refused the use of, the said cage to the plaintiff, whereby the plaintiff was falsely imprisoned." The action was tried at Newcastle before *Pickford*, J., without a jury, and the judgment was delivered at Leeds. No evidence was called. I regret

that that is so, because we have to get the facts as best we can from the opening speech of counsel for the plaintiff, coupled with some statements by way of admission and qualification made by counsel for the defendants. I will state as accurately as I can the material facts which I have gathered from those speeches.

The plaintiff went down the mine on a shift at about half past nine in the morning. The shift would be over and he would be entitled to come up again at about 4 P. M. The plaintiff and two other men were ordered to do certain work. The men said that it was work which they could not be called upon to do, and they refused to do it. At a later date it was determined by a court of summary jurisdiction that the men were wrong, but in my opinion that does not really affect this case. The result of the refusal of these three men to work was that twenty-nine other men, out of sympathy with them, also refused to work. The men, the twenty-nine and the three, thereupon made their way to the bottom of the shaft, and arrived there at about eleven o'clock. The cage was then and until one o'clock engaged in winding coal, and while that is being done it is illegal to carry men in the cage. At one o'clock it ceased to wind coal. At that moment, as of course would be the case, there was one cage at the surface and another at the bottom. There were some lads at the surface whom the manager desired to bring down. He could not bring them down except by hauling up at the same time the cage which was at the bottom, and if that had been done the plaintiff could have gone up in that cage. Eight men out of the twenty-nine took their seats in the cage, although I believe they were told not to do so. The cage was not started. That state of things continued for about twenty minutes. At the end of that time the desire to send the boys down prevailed over the desire not to bring the men up. The plaintiff was told that if he liked he might get into the cage as it was going up. The cage went up, and he got to the surface and went away. These, so far as I can gather them, are the material facts. The plaintiff says, "The cage was, or ought to have been, at my disposal twenty minutes before the time at which in point of fact it was placed at my disposal. I was falsely imprisoned for twenty minutes." It makes no difference, of course, that it was only for a short period of time. If he was falsely imprisoned for a time, although it may have been short, he is entitled to damages.

The question for decision is, were the defendants guilty of false imprisonment? Upon that question there are two things to be determined. First, was there an imprisonment? If that be answered in the affirmative, the further question arises, was it a false inprisonment? If the first question is answered in the negative, the second question does not arise. False imprisonment is wholly a matter in tort, but, for reasons which will become apparent presently, I am going to consider the plaintiff's rights in contract as well as his rights and remedies in tort.

I conceive that the plaintiff's rights in contract were these. He had been taken by his employers down the shaft to his work to a place from which it was impossible to return except by the cage. It results, I think, that the law will imply in the contract a term that he shall be restored from the place to which he had been taken to the surface at a proper time. It is said that that ought to be any reasonable time. That is only another way of saying that in the contract, although not expressed, it is implied by law that the plaintiff shall be brought back to the surface at such time as it must have been in the contemplation of the contracting parties that he should be brought back. What would that include? Obviously it would include that when the plaintiff's shift was over he should be brought back; also, if he were ill. These are but instances. It would include as an implied term that he should be brought to the surface at any such time as it must have been fairly within the contemplation of the contracting parties that he should be brought back. But it would not include an implied term that he should be brought back at whatever time he liked. His right was to be brought back at such a time as the parties must have contemplated as a proper time. After the plaintiff had been in the mine for a short time he committed a breach of his contract in refusing to do his work, and he then demanded to be taken to the surface, a thing which was outside his contract. Being a person who had broken his contract, he had, shall I say, the assurance to ask his employers to assist him in carrying that breach of contract into effect, that is to say, to assist him in cutting short the period of seven hours during which he ought to have stayed down, by taking him up to the surface at that moment. Obviously there was no implied term in the contract requiring the employers to do that. Therefore, at the time when the plaintiff desired to be taken to the surface he had no contractual right to call upon his employers to afford him the necessary facilities, and as far as the contract between the parties was concerned the defendants were entitled to refuse to do so.

What were the plaintiff's rights in tort? In the words of Patteson, J., in Bird *v.* Jones, 7 Q. B., at p. 751, he had the right to say, "If one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room." But is it true to say that the defendants compelled the plaintiff against his will to remain in the mine and imprisoned him? To my mind it is not. It is true that he could not leave the place; but he was detained there, not by any act of the defendants, but by a certain physical difficulty arising from the situation of the place, a difficulty which the plaintiff was, as between himself and his employers, contractually entitled to call upon them to remove for him at a time, but not at that time. What kept him from getting to the surface was not any act which the defendants did, but the fact that he was at the bottom of a deep shaft, and that there were no means of getting out other than the par-

ticular means which belonged to his employers and over which the plaintiff had contractual rights which at that moment were not in operation. He had no right to say to the defendants at that moment, "You are preventing me from getting out of the mine." The defendants' reply would be, "We are not preventing you from getting out; get out by all means if you can. But you are not entitled to call upon us to take you out when contractually, as between you and us, we are not bound to do so. You are calling upon us to assist you in your breach of contract by taking you out. We are bound by contract to do so at a time, but not at this time." From that it follows, in my opinion, that there was no imprisonment of the plaintiff by the defendants. The passage from the judgment of Patteson, J., in Bird v. Jones, 7 Q. B., at p. 751, cannot be read as if it said that if one man declines to give another man facilities for leaving a place which he desires to leave he imprisons him. He does not do so. He imprisons him if he prevents him from leaving; but he does not imprison him because he does not assist him to come out. The two propositions are perfectly different, the one from the other.

It will be seen from what I have said that there is in my view no occasion to say anything as to the other part of the argument, namely, as to whether the plaintiff had committed an offense, and, if he had, whether it was a statutory offense, and whether he was punishable by a penalty for what he had done. The defendants do not contend that they were entitled to imprison the plaintiff because he had committed an offense. The argument for the defendants at the trial was really addressed to the plaintiff's rights by way of contract. The defendants were, no doubt, saying, "We were not bound to wind the engine for you in these circumstances, because as between you and us you had no right to go to the surface. You ought to have been doing your work." The defendants did in that sense say that they were not going to assist the plaintiff to get out; but they never said that they were going to punish the plaintiff for an offense which according to their view he had committed. I will read two passages from the shorthand note of Mr. Mitchell Innes' argument at the trial which clearly show the position taken up by the defendants. He said: "The company have always insisted that under that contract they were entitled to offer that man the cage at the end of that shift and at no other time. He went down there under an agreement to work for that length of time; that implies the further proposition that he was not entitled as of right to leave his work until the shift was at an end." Speaking for myself, it appears to me that that passage accurately states the position. It is perfectly correct to say that under the contract between the plaintiff and his employers he was not entitled to call upon them to use the cage for him till he had performed his work, or until some of the circumstances which I have mentioned had arisen. The other passage is as follows: "He went down to work for a shift, and until that shift is

over he may not come up." Of course that means, as between the man and his employers, he may not come up. "There is nothing in the circumstances of this case, and the facts of this case, I respectfully submit, that can afford foundation for the proposition that he has shown any title to ascend by the cage at any time during the shift, or that we have done anything which disentitles us to enforce that term of our contract which entitles us to refuse him the cage until he has performed his part of the contract and done his work for seven hours." Again, that is entirely upon his contractual rights. "He has shown no title to ascend. He has shown no right to call, by way of specific performance, if that were possible, upon the master to wind the cage for him because he is entitled to come up. He has done nothing which disentitles us to enforce that term of our contract which entitles us to refuse him the cage."

The question may be tested in another way. Suppose that at the end of the shift, when there would be a contractual right on the part of the man to come up, the master were to say that it was not convenient to bring the man up at that time and that he must remain in the pit for another hour, the man would be entitled to damages for breach of contract, but would there be any false imprisonment? In my opinion there would not. The master has not imprisoned the man. He has not enabled him to get out as under the contract he ought to have done, but he has done no act compelling him to remain there.

I only wish to add that if it were supposed that in the judgment which I have delivered I have affirmed in any degree any right on the part of the master to inflict by way of punishment upon the man for not doing his work the penalty that the man shall stay in an assigned place for an assigned time, I have wholly failed to convey my meaning. I mean nothing of the sort. The master has no right to compel the man, by way of penalty or punishment, to suffer an inconvenience by staying down a mine. That is not the question in this case. The question is whether the defendants falsely imprisoned the plaintiff. To my mind, they did not imprison him, because they did not keep him there; they only abstained from giving him facilities for getting away.

I conclude by calling attention to the fact, which is really of the essence of the matter, that this is not an action in contract, but in tort, and in tort the question is whether the defendants did anything to compel the plaintiff to remain in the mine, and whether they imprisoned him. In my opinion the defendants did not imprison the plaintiff; all that they did was to refrain from giving him a facility which in the circumstances they were not bound to give him.

For these reasons I am of opinion that this appeal succeeds.[1]

[1] The concurring opinion of HAMILTON, L. J., and the dissenting opinion of VAUGHAN WILLIAMS, L. J., are omitted. — ED.

SECTION V.

Action in Pursuance of Permission.

644242

REGINA v. DADSON.

CROWN CASE RESERVED. 1850.

[*Reported* 4 *Cox C. C.* 358.]

THE prisoner was tried and convicted before ERLE, J., at the last Maidstone Assizes, but the learned judge, entertaining some doubt as to the propriety of the conviction, reserved the following case: —

George Dadson was indicted for shooting at William Waters, with intent to do him grievous bodily harm. It appeared that he, being a constable, was employed to guard a copse, from which wood had been stolen, and for this purpose carried a loaded gun. From this copse he saw the prosecutor come out, carrying wood, which he was stealing, and called to him to stop. The prosecutor ran away, and the prisoner, having no other means of bringing him to justice, fired, and wounded him in the leg. These were the facts on which the prisoner acted. It was alleged in addition that Waters was actually committing a felony, he having been before convicted repeatedly of stealing wood, but these convictions were unknown to the prisoner, nor was there any reason for supposing that he knew the difference between the rules of law relating to felony and those relating to less offences. I told the jury that shooting with intent to wound amounted to the felony charged, unless from other facts there was a justification; and that neither the belief of the prisoner that it was his duty to fire if he could not otherwise apprehend the prosecutor, nor the alleged felony, it being unknown to him, constituted such justification. Upon this the prisoner was convicted of felony, and let out on his recognizances to come up for judgment, if required. I have to request the opinion of the judges whether this conviction was right.

[This case stood for argument on Wednesday, November 20, but no counsel were instructed. For the legal distinction adverted to in the case with regard to the apprehension of felons and misdemeanants only, see 1 Hale, 481 · 4 Bl. Com. 179; Fost. 271; R. v. Smith, 1 Russ. on Cr. 546.] *Cur. adv. vult.*

POLLOCK, C. B., delivered the judgment of the court. (After stating the facts as above.) We are all of opinion that the conviction is right. The prosecutor not having committed a felony known to the prisoner at the time when he fired, the latter was not justified in firing at the prosecutor; and having no justifiable cause, he was guilty of shooting at the prosecutor with intent to do him grievous bodily harm, and the conviction is right. *Conviction affirmed.*

645 ff2

STRANG v. RUSSELL.

SUPREME COURT OF NEW ZEALAND, 1904.

[*Reported* 24 *N. Z. L. R.* 916.]

COOPER, J. This is an action in which the plaintiff claims to recover from the defendant damages for trespass alleged by the plaintiff to have been committed by the defendant upon a small lake or lagoon known as the Hokowhitee Lagoon, at Palmerston North, and claimed by the plaintiff as his property.[1]

The defendant . . . in cross-examination by Dr. Findlay said that he had been accustomed to boat on the lagoon for over three years, and had not been warned by Strang, although he had often met him on the lagoon; and that he had not up to the 4th of September received any notice from Strang that he claimed the right to exclude him from the use of the lagoon. He also said that on the Sunday succeeding the 4th of September he saw Strang, and that Strang said to him, "You are at liberty to go on the lagoon whenever you like, Russell, or any other respectable person."

One of the defenses submitted on behalf of the defendant was that, even if the plaintiff owned the bed of the lagoon and had the right to exclude others from boating upon it, the defendant had the plaintiff's implied leave and license to go on the lagoon on the 4th of September, that that leave and license had not been withdrawn, and that therefore no trespass had been committed. But, in my opinion, this defense cannot prevail. The defendant, in going on the lagoon on the 4th of September with Bell, went there, according to his own admission, not because of any leave or license which may have been given to him by the plaintiff, but under a claim of right to do so as a riparian proprietor, having found out that the plaintiff claimed to have bought the lagoon, and for the express purpose of contesting the plaintiff's legal right to ownership of the bed of the lagoon. He, in fact, proceeded on the 4th of September along the lagoon not in pursuance of any implied permission given to him by the plaintiff, but in the exercise of a presumed legal right adverse to the plaintiff's claim as an owner, and with the intention of contesting the plaintiff's right as alleged owner of the lagoon.

[1] Part of the opinion only is given. — ED.

646742

THE SIX CARPENTERS' CASE.

KING'S BENCH, 1610.

[*Reported* 8 *Co.* 146 a.]

IN trespass brought by John Vaux against Thomas Newman, carpenter, and five other carpenters, for breaking his house, and for an assault and battery, 1 Sept. 7 Jac. in London, in the parish of St. Giles *extra* Cripplegate, in the ward of Cripplegate, &c. and upon the new assignment, the plaintiff assigned the trespass in a house called the Queen's Head. The defendants to all the trespass *præter fractionem domus* pleaded not guilty; and as to the breaking of the house, said, that the said house *præd' tempore quo, &c. et diu antea et postea,* was a common Wine Tavern, of the said John Vaux, with a common sign at the door of the said house fixed, &c. by force whereof the defendants, *præd' tempore quo, &c. viz. hora quarta post meridiem* into the said house, the door thereof being open, did enter, and did there buy and drink a quart of wine, and there paid for the same, &c. The plaintiff, by way of replication, did confess, that the said house was a common tavern, and that they entered into it, and bought and drank a quart of wine, and paid for it: but further said, that one John Ridding, servant of the said John Vaux, at the request of the said defendants, did there then deliver them another quart of wine, and a pennyworth of bread, amounting to 8*d.* and then they there did drink the said wine, and eat the bread, and upon request did refuse to pay for the same: upon which the defendants did demur in law: and the only point in this case was, if the denying to pay for the wine, or non-payment, which is all one (for every non-payment upon request, is a denying in law) makes the entry into the tavern tortious.

And, first, it was resolved when an entry, authority, or license, is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio:* but where an entry, authority, or license, is given by the party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser *ab initio.* And the reason of this difference is, that in the case of a general authority or license of law, the law adjudges by the subsequent act, *quo animo,* or to what intent, he entered; for *acta exteriora indicant interiora secreta. Vide* 11 H. 4. 75 b. But when the party gives an authority or license himself to do any thing, he cannot, for any subsequent cause, punish that which is done by his own authority or license. And therefore the law gives authority to enter into a common inn, or tavern, so to the lord to distrain; to the owner of the ground to distrain damage-feasant; to him in reversion to see if waste be done; to the commoner to enter

upon the land to see his cattle, and such like. *Vide* 12 E. 4. 8 b. 21 E. 4. 19 b. 5 H. 7. 11 a. 9 H. 6. 29 b. 11 H. 4. 75 b. 3 H. 7. 15 b. 28 H. 6. 5 b. But if he who enters into the inn or tavern doth a trespass, as if he carries away any thing; or if the lord who distrains for rent, or the owner for damage-feasant, works or kills the distress; or if he who enters to see waste breaks the house, or stays there all night; or if the commoner cuts down a tree, in these and the like cases, the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio*, as it appears in all the said books. So if a purveyor takes my cattle by force of a commission, for the King's house, it is lawful: but if he sells them in the market, now the first taking is wrongful; and therewith agrees 18 H. 6. 19 b. *Et sic de similibus.*

2. It was resolved *per totam curiam*, that not doing, cannot make the party who has authority or license by the law a trespasser *ab initio*, because not doing is no trespass; and, therefore, if the lessor distrains for his rent, and thereupon the lessee tenders him the rent and arrears, &c. and requires his beasts again, and he will not deliver them, this not doing cannot make him a trespasser *ab initio*; and therewith agrees 33 H. 6. 47 a. So if a man takes cattle damage-feasant, and the other offers sufficient amends, and he refuses to re-deliver them, now if he sues a Replevin, he shall recover damages only for the detaining of them, and not for the taking, for that was lawful; and therewith agrees F. N. B. 69 g. *temp.* E. 1. Replevin 27. 27 E. 3. 88. 45 E. 3. 9. So in the case at bar, for not paying for the wine, the defendants shall not be trespassers, for the denying to pay for it is no trespass, and therefore they cannot be trespassers *ab initio;* and therewith agrees directly in the point 12 Edw. 4. 9b. For there Pigot, Serjeant, puts this very case, if one comes into a tavern to drink, and when he has drunk he goes away, and will not pay the taverner, the taverner shall have an action of trespass against him for his entry. To which Brian, C. J., said, the said case which Pigot has put, is not law, for it is no trespass, but the taverner shall have an action of debt.

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647 ff 12

OXLEY *v.* WATTS.

KING'S BENCH, 1785.

[*Reported* 1 *T. R.* 12.]

THIS was an action of trespass for taking a horse, tried before *Lord Mansfield*, at the last Summer Assizes, at Maidstone.

The defendant, as bailiff of Lord Dartmouth, lord of the manor of A., justified taking the said horse as an estray.

Replication, that after the taking mentioned in the declaration, the defendant worked the said horse, and so became a trespasser *ab initio*.

Erskine now moved to set aside the verdict which had been obtained by the plaintiff, on the ground that this should have been an action on the case for the consequential damage, and not an action of trespass, because the original taking was admitted to be lawful.

But *per curiam*, The subsequent usage is an aggravation of the trespass in taking the horse; for the using made him a trespasser *ab initio*. Vid. Taylor *v.* Cole, 3 T. R. 292.

Rule refused.

ALLEN *v.* CROFOOT.

SUPREME COURT, NEW YORK, 1830.

[*Reported* 5 *Wend.* 506.]

ERROR from the Cortland common pleas. Crofoot sued Allen in a justice's court, and declared against him in trespass for entering his house in his absence and obtaining copies of papers for the purpose of commencing a suit against him. The defendant pleaded the general issue and license to enter the house. The cause was tried by a jury, who found a verdict for the plaintiff for $50, for which sum and the costs of suit (as stated in the return) the justice gave judgment. The defendant appealed to the Cortland common pleas, and on the trial in that court the following facts appeared: There had been an arbitration between one Parsons and Crofoot, and an award had been made in favor of Parsons. Allen was the attorney of Parsons, and on receiving from Crofoot the sum of money awarded, delivered up to him his bond and the award. At the time of payment, something was said about further claims that Parsons had against Crofoot, which the latter said he would not pay. After this, it seems that Allen thought he had done wrong in delivering up the bond and award, and went to the house of Crofoot in his absence to take copies of the bond and award, under the pretense that he was subpœnaed as a witness and wanted to refresh his memory as to the transactions, when in fact his object was to obtain copies for the purpose of commencing a suit against Crofoot, which subsequently was commenced. This excuse he made to a brother-in-law of the plaintiff, to prevent him from taking the papers from him; the brother-in-law having gone into the room where he was copying the papers, at the request of the plaintiff's wife, who was greatly agitated. It was shown that the defendant had admitted that he would not

have got the copies had he not practised a deception upon the plaintiff's wife and brother-in-law, and that he went to the plaintiff's house in his absence, knowing that had he been at home he could not have obtained copies of the papers. It further appeared, that when he went to the house of the plaintiff, the defendant knocked at the door and was bidden to come in; and that he was on terms of intimacy with the plaintiff, and in the habit of resorting to his house. The court charged the jury, that if they should be of opinion that the defendant had acted unfairly or improperly in obtaining copies of the papers, and had gone to the plaintiff's house with the intention of fraudulently obtaining such copies, though he had leave to enter the house, they should find for the plaintiff; but if he acted correctly and openly, and had leave to enter the house, they should find for the defendant. The defendant excepted to this charge, and the jury found a verdict for the plaintiff with $75 damages. The defendant sued out a writ of error.[1]

SAVAGE, C. J. It is also urged by the plaintiff in error, that the court below erred in charging the jury that the action was sustainable, if they should find that the defendant entered the plaintiff's house fraudulently, to obtain improperly copies of papers in the absence of the plaintiff. It was decided in The Six Carpenters' Case, 4 Co. 290, that where an authority to enter upon the premises of another is given by law, and it is subsequently abused, the party becomes a trespasser *ab initio;* but where such authority or license is given by the party, and it is subsequently abused, the party guilty of the abuse may be punished; but he is not a trespasser; and the reason of the difference is said to be, that in case of a license by law, the subsequent tortious act shows *quo animo* he entered; and having entered with an intent to abuse the authority given by law, the entry is unlawful; but where the authority or license is given by the party, he cannot punish for that which was done by his own authority. Whether this is not a distinction without a difference of principle, it is not necessary to inquire. A better reason is given for it in Bacon's Abr. tit. Trespass, B. Where the law has given an authority, it is reasonable that it should make void everything done by the abuse of that authority, and leave the abuser as if he had done everything without authority. But where a man, who was under no necessity to give an authority, does so, and the person receiving the authority abuses it, there is no reason why the law should interpose to make void everything done by such abuse, because it was the man's folly to trust another with an authority who was not fit to be trusted therewith. It is contended that the license being obtained by fraud was void. The defendant knocked at the door and was told to walk in; he was found copying certain papers; but how he obtained them, on what representation, or from whom, the evidence does not disclose. One witness does indeed testify that he said he would not have got the copies, if he had not practised a deception on the wife

[1] Part of the case, involving the legality of the appeal bond, is omitted. — ED.

and brother-in-law of the plaintiff. If this declaration should be considered evidence of his having made improper representations to obtain the papers, then the question arises, does he thereby become a trespasser *ab initio*?

It has been decided that to enter a dwelling house without license, is in law a trespass, 12 Johns. R. 408, and that possession of property obtained fraudulently confers no title. Under such circumstances no change of property takes place, 15 Johns. R. 186; and it is argued that as fraud vitiates everything into which it enters, a license to enter the house fraudulently obtained is void, and is no license. The principle of relation has never been applied to such a case, nor is it necessary for the purposes of justice to extend it farther than to cases where the person enters under a license given him by law. In such cases, as the party injured had not the power to prevent the injury, it seems reasonable that he should be restored to all his remedies.

The judgment must be reversed without costs, and a *venire de novo* awarded by Cortland common pleas.

SECTION VI.

Action under Mistake as to Permission. 650742

SAMUEL *v.* PAYNE.

COURT OF KING'S BENCH, 1780.

[*Reported* 1 *Doug.* 359.]

ACTION of trespass and false imprisonment, against Payne, a constable, and two others. The facts of the case were these: Hall, one of the defendants, charged the plaintiff with having stolen some laces from him, which he said were in the plaintiff's house. A search warrant was granted by a justice of peace upon this charge, but there was no warrant to apprehend him. On the search, the goods were not found; however, Payne, Hall, and the other defendant, an assistant of Payne's, arrested the plaintiff, and carried him to the Poultry Compter on a Saturday, when no alderman was sitting, by which means he was detained till Monday, when, after examination, he was discharged. The cause was tried before *Lord Mansfield*, and a verdict found against all the three defendants. At the trial, his Lordship, and the counsel on both sides, looked upon the rule of law to be, that, if a felony has actually been committed, any man, upon reasonable probable grounds of suspicion, may justify apprehending the suspected person to carry him

before a magistrate; but that, if no felony has been committed, the apprehension of a person suspected cannot be justified by anybody. His Lordship therefore left it to the jury to consider, whether any felony had been committed. The rule, however, was considered as inconvenient and narrow; because, if a man charges another with felony, and requires an officer to take him into custody, and carry him before a magistrate, it would be most mischievous that the officer should be bound first to try, and at his peril exercise his judgment on the truth, of the charge. He that makes the charge should alone be answerable. The officer does his duty in carrying the accused before a magistrate, who is authorized to examine, and commit or discharge.

On this ground, a motion was made for a new trial, and, after cause shown, the court held, that the charge was a sufficient justification to the constable and his assistants, and cited Ward's Case in Clayton, (Clayt. 44. pl. 76) 2 Hale's Pleas of the Crown, 84, 89, 91, and 2 Hawkins, B. 2, c. 12, and c. 13.[1]

The rule made absolute.[2]

ELDER *v.* MORRISON.

SUPREME COURT, NEW YORK, 1833.

[*Reported* 10 *Wend.* 128.]

ERROR from the Orange common pleas. Morrison sued Elder in an action of assault and battery. The defendant pleaded the general issue, and gave notice of special matter. On the trial, the following facts appeared: The plaintiff, on the premises of one Milburn, offered for sale two horses at public auction, in pursuance of a previous notice. Woodward, a constable of Walkill, having in his hands a justice's execution against Milburn, was present and forbade the sale, claiming the horses under the execution and demanding possession of them, which the plaintiff refused to yield. Woodward demanded assistance from the bystanders; no one obeying him, he called upon the defendant by name to assist him in obtaining possession of the horses, and

[1] None of these authorities come exactly up to the present case, which is therefore the first determination of the point. In Ward's Case (which is very loosely reported), it would seem, that the goods had been actually stolen. The very point of this case had been agitated on a demurrer to a special justification, so long ago as the reign of Hen. IV. (Year Book, 7 Hen. IV. p. 35. pl. 3) and the court seems to have thought, that, if the cause of suspicion should appear reasonable, the justification would be good, though no felony were committed. But the case was adjourned (*vide* Ledwick *v.* Catchpole, B. R. E. 23 Geo. III. Cald. 291).

[2] The new trial came on before Lord Mansfield, at the sittings after this term, when a verdict was found against Hall, and for the other two defendants.

threatened him with legal proceedings if he did not obey. Woodward succeeded in obtaining possession of one of the horses, and then he, the plaintiff, and the defendant went into the stable where the other horse was, upon which a struggle ensued as to who should have the possession of that horse, in the course of which the defendant jerked the plaintiff about, who had hold of a halter which was upon the horse, elbowed him and threw him down, which was the assault and battery complained of. The defendant, under the notice attached to his plea, proved the rendition of a judgment against Milburn, the issuing of an execution thereon, and a delivery of the writ to Woodward, and that by virtue thereof and of another execution subsequently received, Woodward, who was indemnified by the plaintiff in the execution, sold the horses. At the time of the levy, Woodward inquired of Milburn where his horses were, who pointed out the horses in question. The plaintiff offered to prove that he was the owner of the horses at the time of the taking by Woodward, which evidence was objected to by the defendant, but the objection was overruled and the evidence received; to which decision the defendant excepted. The jury found a verdict for the plaintiff with $25 damages, on which judgment was rendered. The defendant sued out a writ of error.

SAVAGE, C. J. For the plaintiff in error, it is argued that the officer, when indemnified by the plaintiff in the execution, is bound to sell the property; and that by the Revised Statutes, 2. R. S. 441, § 80, it is enacted that when a sheriff or other public officer shall find resistance, or have reason to apprehend it in the execution of any process delivered to him, he may command every male inhabitant of his county, or as many as he shall think proper, to assist him in overcoming such resistance, and in seizing and confining the resisters. The statute further requires that the officer shall certify to the court, from which the process issued, the names of the resisters, to the end that they may be punished for their contempt of such court. Id. § 81. And it is enacted that every person commanded by an officer to assist him, who shall refuse without lawful cause, shall be deemed guilty of a misdemeanor, and subject to fine and imprisonment. Id. § 82. The inference drawn by the counsel for the plaintiff in error from these premises is, that the person who comes in aid of an officer to overcome resistance, is justified, whether the officer is or not justified; and that the question of title to the property was not a proper subject of inquiry. On the part of the defendant in error, it is contended that if the principal be a trespasser, all persons acting in his aid or by his command are also trespassers; that the fair meaning of the statute is, that the officer shall be aided in the lawful execution of his process, and that such process must be against the individual whose person or property is attempted to be seized; that the process to authorize a justification must be against the person in possession of the property taken.

It is certainly true that if the officer be guilty of a trespass, those who

act by his command or in his aid must be trespassers also, unless they are to be excused in consequence of the provision of the revised statutes. If a stranger comes in aid of an officer in doing a lawful act, as executing legal process, but the officer, by reason of some subsequent improper act, becomes a trespasser *ab initio*, the stranger does not thereby become a trespasser, Cro. Eliz. 181; Cro. Car. 446; but when the original act of the officer is unlawful, any stranger who aids him will be a trespasser, though he acts by the officer's command. Oystead *v.* Shed, 12 Mass. R. 511. The case in Massachusetts, just cited, was an action of trespass *de bonis asportatis* against Shed and three others; Shed and Fletcher justified as officers under writs of attachment, the two other defendants justified as servants of Fletcher; the plaintiff replied, and the defendants demurred to the replications. The court adjudged Fletcher's plea bad, and the justification of the other two defendants failed of course; and their ignorance of the law, it was said, would not excuse their conduct or diminish in any degree the injury which the plaintiff sustained. The case of Leonard *v.* Stacey, 6 Mod. 140, is to the same effect. That was an action of trespass for entering the plaintiff's house and taking away his goods. The defendant justified that he came in aid of an officer in execution of a writ of replevin. The plaintiff replied that he claimed property in the goods, and gave notice to the defendant before their removal. The court held the defendant was a trespasser *ab initio*, for though the claim should be made to the sheriff, yet if it be notified to him who comes in aid that claim is made, he ought to desist at his peril; thereby establishing the proposition, that if the officer is a trespasser, all those who act by his command or in his aid are also trespassers. Whenever a sheriff or constable has power to execute process in a particular manner, his authority is a justification to himself and all who come in his aid; but if his authority is not sufficient to justify him, neither can it justify those who aid him. He has no power to command others to do an unlawful act; they are not bound to obey, neither by the common law nor the statute, and if they do obey, it is at their peril. They are bound to obey when his commands are lawful, otherwise not. The only hardship in the case is, that they are bound to know the law. But that obligation is universal; ignorance is no excuse for any one. The counsel for the plaintiff in error insists that there is a difference between aiding in the original taking and in overcoming resistance. It seems to me there is no such distinction. If the taking was lawful, the resistance was unlawful; but if the taking was unlawful, the resistance was lawful. If the resistance was lawful, neither the officer nor those he commands to assist him can lawfully overcome that resistance. Nor does the fact of the officer's being indemnified, confer on him any authority which he had not without such indemnity; he may thereby be compelled to do an illegal act in selling the property of strangers to the execution, but he is a trespasser in doing so, as are all others who aid him.

In any view of the subject which I can take, I am of opinion that the decision of the court of common pleas was correct, and the judgment should be affirmed.[1]

Judgment affirmed.

WATSON v. STATE.

SUPREME COURT OF ALABAMA, 1887.

[*Reported* 83 *Ala.* 60.]

CLOPTON, J. The defendant was convicted on a charge of having committed an assault and battery on Harrison Ward. The only material question presented by the record, is whether the defendant is guilty of the offense charged, if he, without doing more, and using no excess of force, merely arrested, secured, and delivered him to the deputy-sheriff, who a few moments previously had called on the defendant to assist in making the arrest, informing him that he had a warrant for Ward's arrest, but in fact had no such warrant, having mistaken him for another person of the same surname, but different christian name.

By section 4666 of Code of 1876, it is made the duty of every person, when required to do so by an officer, to assist him in making an arrest; and by section 4139, it is made a criminal offense, to refuse or neglect to obey the command of any sheriff, constable, or other officer having authority, when summoned or commanded to assist such officer in making an arrest.

Any officer, authorized by law to make arrests, is empowered to summon or command necessary and proper assistance in apprehending criminals. A deputy-sheriff is authorized to make arrests. In 1 Bish. on Crim. Pro., § 185, the author says: "The officer, then, in making an arrest, or in securing his prisoner afterward, may, if he deems it necessary, call upon a bystander for help, or even command the aid of all persons in his precinct, and equally whether he is acting under a warrant or without. A refusal to assist him is indictable, provided he is proceeding by lawful authority; or, if he is not, his command will be a justification to one who, knowing his official character, comes in good faith to his assistance."

The power of the officer to command assistance, when necessary, is essential to the due execution of the criminal law, and to the protection of society. This power, which extends to calling to his aid the *posse comitatus*, oftentimes would be unavailing, especially in emergencies requiring prompt action and assistance, if the person summoned

[1] See, however, Firestone v. Rice, 71 Mich. 377. — ED.

was required to examine the papers of the officer, and determine his authority to make the particular arrest — whether it would be safe to assist him. The officer is empowered by the statute to determine the necessity and time of assistance, and prompt obedience is the duty of the person summoned or commanded. The necessity does not admit of delay. The officer, if acting without warrant, may be a trespasser; but the private person may rely upon his known official character and his call for aid, and will be protected in doing what he is not at liberty to refuse or neglect. It is sufficient if the general official authority of the person, calling for aid, to make arrests, is known. When his general power is known, his call will justify the citizen in yielding obedience, unless he has notice of the want of authority in the particular case in which assistance is required. It would be a strange legal anomaly, to punish a citizen for obeying the command of an officer invested with lawful authority to command in the matter, and at the same time subject him to punishment if he refuses or neglects to obey. The duty is not devolved, to inquire whether the officer has a process authorizing the arrest, or into the legality of the process. McMahon *v.* Green, 34 Vt. 69; Reed *v.* Rice, 2 J. J. Mar. 44.

Several of the rulings of the court conflict with the rule herein declared. It is unnecessary to specify them.

Reversed and remanded.

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655 f & 2

COMMONWEALTH *v.* CROTTY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1865.

[*Reported* 10 *All.* 403.]

BIGELOW, C. J. We cannot entertain a doubt that the warrant on which the officer attempted to arrest one of the defendants at the time of the alleged riot was insufficient, illegal, and void. It did not contain the name of the defendant, nor any description or designation by which he could be known and identified as the person against whom it was issued. It was in effect a general warrant, upon which any other individual might as well have been arrested, as being included in the description, as the defendant himself. Such a warrant was contrary to elementary principles, and in direct violation of the constitutional right of the citizen, as set forth in the Declaration of Rights, article 14, which declares that every subject has a right to be secure from all unreasonable searches and seizures of his person, and that all warrants, therefore, are contrary to this right, if the order in the warrant to a civil officer to arrest one or more suspected persons or to seize their property be not accompanied with a special designation of the persons or objects of search, arrest, or seizure. This is in fact only a declaration

of an ancient common law right. It was always necessary to express the name or give some description of a party to be arrested on a warrant; and if one was granted with the name in blank, and without other designation of the person to be arrested, it was void. 1 Hale, P. C., 577. 2 Ib., 119. Foster, 312. 7 Dane Ab., 248. 1 Chit. Crim. Law, 39. Mead *v.* Haws, 7 Cow. 332, and cases cited.

This rule or principle does not prevent the issue and service of a warrant against a party whose name is unknown. In such case the best description possible of the person to be arrested is to be given in the warrant; but it must be sufficient to indicate clearly on whom it is to be served, by stating his occupation, his personal appearance and peculiarities, the place of his residence, or other circumstances by which he can be identified. 1 Chit. Crim. Law, 39, 40.

The warrant being defective and void on its face, the officer had no right to arrest the person on whom he attempted to serve it. He acted without warrant and was a trespasser. The defendant whom he sought to arrest had a right to resist by force, using no more than was necessary to resist the unlawful acts of the officer. An officer who acts under a void precept, and a person doing the same act who is not an officer, stand on the same footing. Shadgett *v.* Clipson, 8 East, 328; Rex *v.* Hood, 1 Mood. C. C. 281; Hoye *v.* Bush, 2 Scott N. R. 86; Pearce *v.* Atwood, 13 Mass. 324, 344; Sanford *v.* Nichols, Ib. 286; Commonwealth *v.* Kennard, 8 Pick. 133; and any third person may lawfully interfere to prevent an arrest under a void warrant, doing no more than is necessary for that purpose. 1 Chit. Crim. Law, 44. The King *v.* Osmer, 5 East, 304–308.

The defendants, therefore, in resisting the officer in making an arrest under the warrant in question, if they were guilty of no improper or excessive force or violence, did not do an unlawful act by lawful means, or a lawful act by unlawful means, and so could not be convicted of the misdemeanor of a riot, with which they are charged in the indictment.

The instructions under which the case was submitted to the jury did not meet this aspect of the case. It must therefore go to a new trial.

Exceptions sustained.

CHASE *v.* INGALLS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1867.

[*Reported* 97 *Mass.* 524.]

WELLS, J. The execution, upon which the plaintiff was arrested and committed, was regular in form, and bore the affidavit and certificate of a magistrate as provided by the Gen. Sts. c. 124, § 5. *Prima*

facie, it is a complete defense to the officers acting in accordance with its directions. The defect relied on by the plaintiff to deprive them of its protection is the fact, now admitted, that the magistrate who made the certificate was the attorney of record of the party in whose favor the execution issued.

It is settled law that an officer is protected by his precept, if the court or magistrate had authority such as the precept assumes. It is not his duty to inquire into the particular facts of the case, if the general power appear and the process be regular. He cannot be affected by any irregularity occurring prior to the issue of his precept, nor by the existence of any fact which deprives the court or magistrate of jurisdiction in that particular case, provided the defect be not disclosed by the precept itself, nor known to the officer. Even if the defect be one which renders the precept void in its operation between the parties, or for the transfer of property, yet it will not subject the officer to liability as a trespasser. See Sandford *v.* Nichols, 13 Mass. 286, and cases cited to this point by the defendants.

The cases relied upon by the plaintiff do not support any doctrine inconsistent with this. The decision in Pierce *v.* Atwood, 13 Mass. 324, 344, is put expressly upon the ground that the want of authority in the magistrate appeared from the warrant itself. In Fisher *v.* McGirr, 1 Gray, 45, the want of jurisdiction arose from the very character of the proceeding, which the warrant disclosed. In Piper *v.* Pearson, 2 Gray, 120, the officer was held liable because his warrant did not show affirmatively an apparent jurisdiction, there being none in fact, and the burden being upon him to establish his justification.

Where the proceeding is, in its nature, one in which the magistrate has no right to exercise the authority under which the officer assumes to act, he is held responsible although acting in good faith; because in such case the want of authority is disclosed upon the face of the precept. But where the want of authority arises from some fact that is personal to the magistrate, or peculiar to the proceedings in the particular case, the precept cannot disclose it, and the officer is not to be held liable without actual knowledge of the fact.

The plaintiff offered no evidence to show that the defendants had actual knowledge that the certifying magistrate was disqualified; not deeming it to be material whether they knew it or not; and the testimony of the defendant Ingalls, as reported, would not warrant the jury in finding such knowledge. He is not entitled now to have a jury to determine that question.

Upon another ground we think the verdict must stand. The arrest was in accordance with the authority and directions of the precept. It is a proper mode of serving an execution, unless the statute (Gen. Sts. c. 124, § 5) restricts the right. The restriction applies to executions "issued for debt or damages in a civil action, except in actions of

tort." Perhaps the term "civil action" might be held to embrace suits for divorce. But the restriction clearly does not extend to all cases that might be termed "civil actions." It is limited to such only as are for the recovery of "debt or damages." This limitation, and the exception of "actions or tort," which follows, indicate that the restriction is not general, and was not intended to apply to such warrants of the court as may issue to enforce its decrees in special proceedings like this of libel for divorce. The allowance of alimony, or the award to the wife of her own or a part of the husband's estate upon granting a divorce, is not a debt nor damages, in the sense of the statute. No affidavit and certificate of a magistrate were necessary; and therefore the exceptions must be overruled.

POOLER *v.* REED.

SUPREME JUDICIAL COURT OF MAINE, 1882.

[*Reported* 73 *Me.* 129.]

LIBBEY, J. The defendant justifies the arrest and imprisonment of the plaintiff, as constable of Bangor, having a legal mittimus therefor. He thus puts directly in issue his legal capacity as such officer.

His appointment to and acceptance of the office of justice of the peace, after his election and qualification as constable, must be held to be a surrender of the office of constable. Stubbs *v.* Lee, 64 Maine, 195.

He was an officer *de facto* when he made the arrest, and while acting as such officer, his acts would be valid as to third parties; and as between them his title to the office could not be tried; but when he is a party and justifies his acts as such officer, he must show that he has a legal title to the office. Stubbs *v.* Lee, 64 Maine, 195; Fowler *v.* Bebee, 9 Mass. 231; Sheehan's Case, 122 Mass. 445; Green *v.* Burke, 23 Wend. 490; People *v.* Hopson, 1 Denio, 574; Reddle *v.* Bedford, 7 Serg. & R. 386; Parker *v.* Luffborough, 10 Serg. & R. 249; Keyser *v.* McKissan, 2 Rawle, 139.

In accordance with the agreement of the parties,

The action must stand for trial.

APPLETON, C. J., BARROWS, VIRGIN, PETERS, and SYMONDS, JJ., concurred.

659(1)k82

JEFFRIES v. HARGIS.

SUPREME COURT OF ARKANSAS, 1887.

[*Reported* 50 *Ark.* 65.]

COCKRILL, C. J. This is an action of trespass brought by appellant against the appellee. It is a petty controversy about the damage done to a piece of wild land by entering upon it and cutting and carrying away a few trees. The defendant had bought the right to cut the timber from a tract adjoining the plaintiff's, and through an apparent misunderstanding as to where the dividing line lay, entered upon the land in controversy. Counsel upon both sides have confined their inquiries to questions arising on the charge to the jury as to what constitutes a trespass, and what evidence was competent to prove the boundary line between the two estates.[1] The abstract goes no farther, and we do not, therefore, go beyond it. . . .

The court also instructed the jury that if the defendant crossed the boundary line between the two tracts, through mistake, he was not guilty of trespass, notwithstanding he cut and carried away the trees. It was the defendant's duty to know the boundaries of his own land and keep within them, and ignorance thereof would not justify a trespass upon his neighbor's land.

The judgment must be reversed and the cause remanded.

659(2)k82

LOWENBERG v. ROSENTHAL.

SUPREME COURT OF OREGON, 1889.

[*Reported* 18 *Ore.* 178.]

THAYER, C. J.[2] The special findings established the fact that the appellants took and carried away timber, or trees, standing or being upon the respondents' land, to the amount of 3,800 cords of wood, of the value of $380, without any lawful authority for taking it, although they had probable cause to believe, and did believe, at the time they carried it away, that the owners of the land had authorized them to

[1] The opinion upon this point of evidence is omitted. — ED.

[2] Only so much of the opinion as discusses the question of authority is here given. — ED.

do so. These facts, as a matter of law, clearly created a liability on the part of the appellants for the value of the wood. The appellants believing, and having probable cause to believe, that the owners of the land had authorized them to take the wood, did not lessen their liability. If one person takes and carries away the property of another without lawful authority to do so, he becomes liable for its value, whatever his belief may have been as to his right to take it. To authorize one man to take the property of another, he must have had the latter's consent to take it. His belief in his right to take it, though he have reasonable grounds therefor, will not be a sufficient justification for the act.

SHORTER *v.* PEOPLE.

COURT OF APPEALS OF NEW YORK. 1849.

[*Reported* 2 *Comstock*, 193.]

Henry Shorter, a negro, was indicted for the murder of Stephen C. Brush, and tried at the Erie County Oyer and Terminer in November, 1848.[1]

The evidence having closed, Justice HOYT, presiding at the trial, proceeded to charge the jury at large upon the case, and having done so, the counsel for the prisoner requested the court to charge that if the deceased struck the first blow, and if there was reasonable ground to apprehend a design on the part of the deceased to do the prisoner some great personal injury, and the prisoner believed that there was imminent danger of such design being accomplished, it was a case of justifiable homicide, although he might be mistaken in such belief; and that the question was not whether such danger existed, but whether the prisoner believed it to exist. The court refused so to charge, but on the contrary charged that to render the killing justifiable the jury should be satisfied that there was in fact imminent danger that the deceased would commit some great personal injury upon the prisoner. The prisoner's counsel excepted to this part of the charge and to the refusal to charge as requested. The jury found the prisoner guilty of murder. A bill of exceptions was made and the case removed by *certiorari* into the Supreme Court, where a new trial was refused. The prisoner brought error to this court.

BRONSON, J. When one who is without fault himself is attacked by another in such a manner or under such circumstances as to furnish reasonable ground for apprehending a design to take away his life, or do him some great bodily harm, and there is reasonable ground for

[1] The evidence, arguments, and part of the opinion are omitted.

believing the danger imminent that such design will be accomplished, I think he may safely act upon appearances, and kill the assailant, if that be necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and there was *in fact* neither design to do him serious injury, nor danger that it would be done. He must decide at his peril upon the force of the circumstances in which he is placed, for that is a matter which will be subject to judicial review. But he will not act at the peril of making that guilt, if appearances prove false, which would be innocence had they proved true. I cannot better illustrate my meaning than by taking the case put by Judge, afterwards Chief Justice Parker, of Massachusetts, on the trial of Thomas O. Selfridge. "A. in the peaceable pursuit of his affairs sees B. walking rapidly towards him with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A. who has a club in his hand, strikes B. over the head, before, or at the instant the pistol is discharged; and of the wound B. dies. It turns out that the pistol was loaded with powder only, and that the real design of B. was only to terrify A." Upon this case the judge inquires, "Will any reasonable man say that A. is more criminal than he would have been if there had been a bullet in the pistol? Those who hold such doctrine must require that a man so attacked must, before he strikes the assailant, stop and ascertain how the pistol was loaded, — a doctrine which would entirely take away the right of self defence. And when it is considered that the jury who try the cause, and not the party killing, are to judge of the *reasonable grounds of his apprehension*, no danger can be supposed to flow from this principle." The judge had before instructed the jury that, "when from the nature of the attack there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended." Selfridge's Trial, p. 160; 1 Russ. on Crime, 699, ed. of '24; p. 485, note, ed. of '36. To this doctrine I fully subscribe. A different rule would lay too heavy a burden upon poor humanity.

I have stated the case of Selfridge the more fully, because it is not only an authority in point, but it is one which the revisers professed to follow in framing our statute touching this question.

I shall not stop to consider the common law distinctions between justifiable and excusable homicide, because our statute has placed killing in self defence under the head of justifiable homicide. 2 R. S. 660, s. 3.

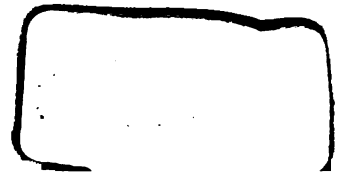
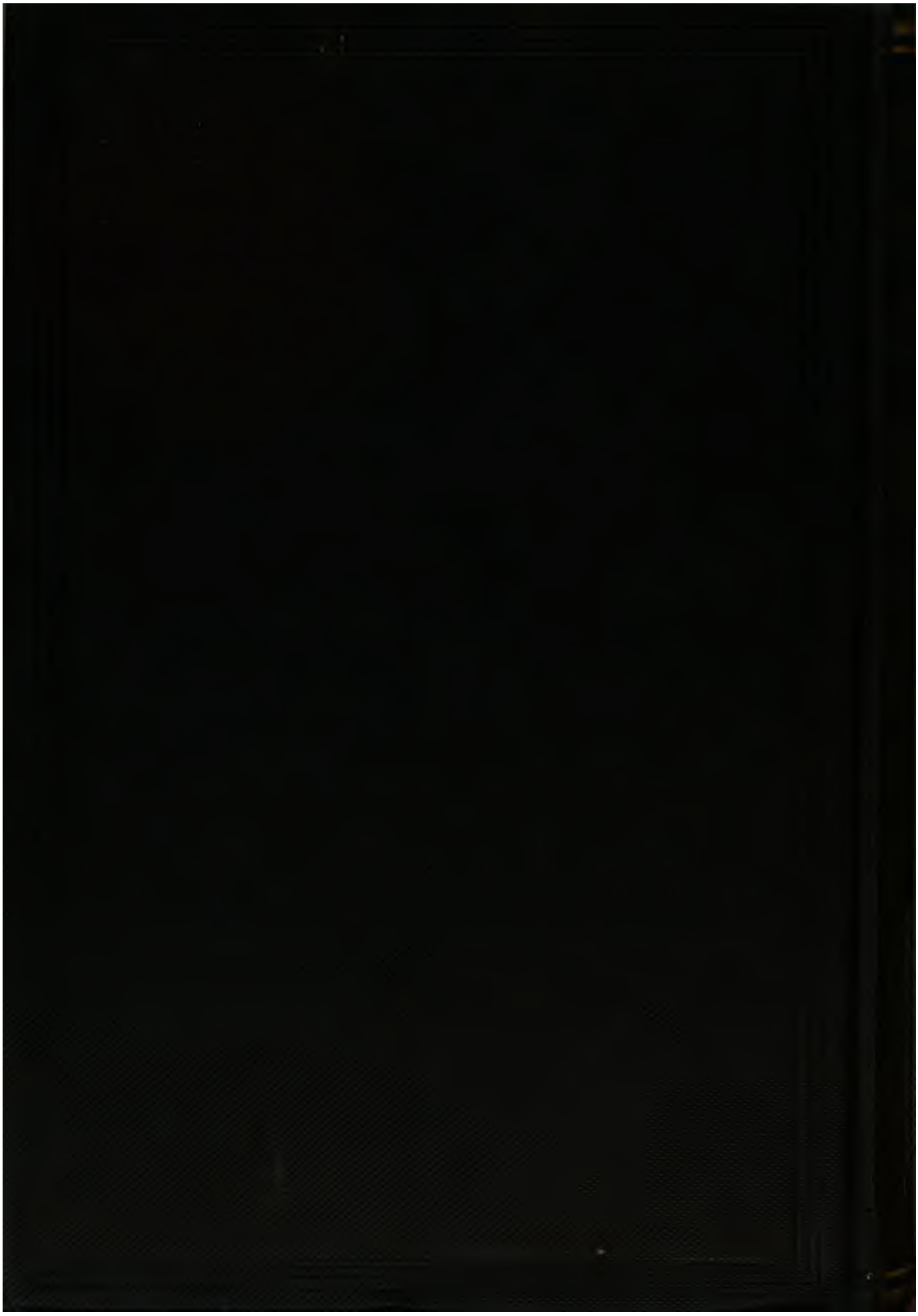
The Massachusetts case lays down no new doctrine. The same principle was acted on in Levett's Case.[1] Foster (Crown Law, p. 299) says of this case, "Possibly it might have been better ruled man-

[1] The learned judge here stated Levett's Case, *ante*. — ED.

slaughter at common law, due circumspection not having been used." I do not understand him as questioning the principle of the decision, but as only expressing a doubt whether the principle was properly applied. He calls it nothing more than a case of manslaughter, when, if a man may not act upon appearances, it was a plain case of murder. So far as I have observed, no other writer upon criminal law has questioned, in any degree, the decision in Levett's Case; and most of them have fully approved it. East, in his Pleas of the Crown (vol. i. p. 274, 375), has done so. Hale (1 P. C. 42, 474) mentions it among cases where ignorance of the fact will excuse from all blame. Hawkins (1 P. C. 84, Curwood's ed.) says the killing had not the appearance of a fault. Russell (on Crimes, vol. i. p. 550, ed. of 1836) approves the decision, which he introduces with the remark that "important considerations will arise in cases of this kind [he was speaking of homicide in defence of one's person, habitation, or property] as to the grounds which the party killing had for supposing that the person slain had a felonious design against him; more especially where it afterwards appears that no such design existed." Roscoe, (Crim. Ev. p. 639) says, "It is not essential that an actual felony should be about to be committed in order to justify the killing. If the circumstances are such as that, after all reasonable caution, the party suspects that the felony is about to be immediately committed, he will be justified." And he then gives Levett's Case as an example.

The case of Sir William Hawksworth, who, through his own fault, was shot by the keeper of his park, who took him for a stranger who had come to destroy the deer, went upon the same principle. 1 Hale's P. C. 40; 1 East, P. C. 275; 1 Russ. on Cr. 549. Other cases are put in the books where the killing will be justified by appearances, though they afterwards prove false. A general, to try the vigilance or courage of his sentinel, comes upon the sentinel in the night in the posture of an enemy, and is killed. There the ignorance of the sentinel that it was his general, and not an enemy, will justify the killing. 1 Hale's P. C. 42; 1 East, P. C. 275; 1 Russ. 540. The case mentioned by Lord Hale, which was before him at Peterborough, where a servant killed his master, supposing he was shooting at deer in the corn in obedience to his master's orders, belongs to the same class. 1 Hale's P. C. 40, 476; 1 Russ. 540. In Rampton's Case (Kelyng Rep. 41) the defendant killed his wife with a pistol which he had found in the street, after ascertaining, as he supposed, by a trial with the ramrod, that it was not loaded, though in fact it was charged with two bullets. This was adjudged to be manslaughter, and not merely misadventure. Foster (Crown Law, 263, 4) calls this a hard case, and thinks the man should have been wholly acquitted, on the ground that he exercised due caution, — the utmost caution not being necessary in such cases. But if the decision was right, as I am inclined to think it was, for the want of proper caution, still the case goes on the ground that the degree of guilt may be affected by appearances which

afterwards prove false; for if he had not tried the pistol, it would have been murder. Foster (p. 265) mentions a case which was tried before him, where the prisoner had shot his wife with a gun, which he supposed was not loaded. The judge, being of opinion that the prisoner had reasonable ground to believe that the gun was not loaded, directed the jury, that if they were of the same opinion, they should acquit the prisoner; and he was acquitted. In Meade's Case (1 Lewin's Cr. Cas. 184) the prisoner had killed with a pistol one of a great number of persons who came about his house in the night time, singing songs of menace, and using violent language. Holroyd, J., told the jury that if there was nothing but the song, and no *appearance* of violence, if they believed there was no *reasonable ground* for apprehending danger, the killing was murder. And in The People *v.* Rector (19 Wend. 569) Cowen, J., said alarm on the part of the prisoner, *on apparent though unreal* grounds, was pertinent to the issue. In The U. S. *v.* Wiltberger (3 Wash. C. C. 515, 521) the judge told the jury that, for the purpose of justifying the killing, the intent of the deceased to commit a felony must be *apparent*, which would be sufficient, although it should afterwards turn out that the real intention was less criminal, or even innocent. He afterwards added that the danger must be imminent, — meaning, undoubtedly, that it must wear that appearance. The State *v.* Wells (1 Coxe N. J. Rep. 424) is entirely consistent with this doctrine. The Supreme Court of Tennessee has gone still further, and held that one who kills another, believing himself in danger of great bodily harm, will be justified, although he acted from cowardice, and without any sufficient ground, in the appearances, for the killing. Grainger *v.* The State, 5 Yerger, 459. This was, I think, going too far. It is not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury can say he had reasonable grounds for his belief.

We have been referred to two cases where it was said, in substance, that the killing must be necessary: Regina *v.* Smith, 8 Car. & Pay. 160, and Regina *v.* Bull, 9 id. 22; and other authorities to the same effect might have been cited. The life of a human being must not be taken upon slight grounds; there must be a necessity, either actual or apparent, for the killing, or it cannot be justified. That, I think, is all that was meant by such remarks as have been mentioned. The unqualified language that the killing must be necessary has, I think, never been used when attention was directed to the question whether the accused might not safely act upon the facts and circumstances as they were presented at the time. I have met with no authority for saying, that a homicide which would be justifiable had appearances proved true, will be criminal when they prove false.

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